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IX

Science of Legal Method

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of the University of Pennsylvania Law School

WITH INTRODUCTIONS BY
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AND BY
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GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than the English, and entertain a much

greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
>
> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fair-*

mont Coal Co.) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental masterworks on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present series is the result of these labors.

In the selection of this series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this series in their latest and most representative form. It is believed that the complete series will represent in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to English readers the most representative views of the most modern writers in jurisprudence and philosophy of law. The series shows a wide geographical representation; but the selection has not been centered on the

notion of giving equal recognition to all countries. Primarily, the desire has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time. Germany, for example, is represented in modern thought by a preponderant metaphysical influence. Italy is primarily positivist, with subordinate German and English influences. France in its modern standpoint is largely sociological, while making an effort to assimilate English ideas and customs in its theories of legislation and the administration of justice. Spain, Austria, Switzerland, Hungary, are represented in the Introductions and the shorter essays; but no country other than Germany, Italy, and France is typical of any important theory requiring additions to the scope of the series.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The series has been so arranged (in the numbered list fronting the title page) as to indicate that order of perusal which will be most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this series will measurably help to improve and to refine our institutions for the administration of justice

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EDITORIAL PREFACE

The greatest question of legal theory nowadays in the arena of professional debate, both in Europe and America, is this: What is the inherent nature of the judicial and the legislative functions, and of the difference between them? What respective parts do judge and legislator perform in the declaring or formulating of law? And what are the materials or data which they respectively employ in this process of law-declaring? In short, is there any inherent necessity for two distinct functionaries? And if there is, what are the respective limitations and requirements in their methods of reasoning?

It might seem singular that such a fundamental debate should not have matured in professional thought, before the era of to-day. Can this tardiness be accounted for? Does political history account for it?

We must recall the fact that even as late as the rise of the Frankish State, the preponderance of influence in the development of economic life and in the administration and evolution of private law on the Continent lay with the mark assemblies and other local jurisdictions, and that there could be no question, under these simpler conditions of social grouping, of a method, either of, or in, the law.

We must remember, too, that under any of the regal systems obtaining in Europe before the French Revolution, the judges were invariably the king's appointees, and that the struggles to determine the location of legislative power were essentially, in their vital personal

aspect, struggles between the parliamentary or popular personnel and the royal personnel. And we may well conclude that the latent judicial share in the law-declaring function would naturally not emerge as an issue; for the judiciary were subordinated to the king; and the notable exception, that of the French Parlement, is one that "proves the rule," for the struggle here between the King and Parlement was centered on the legislative power, and the judicial power of Parlement was only an appurtenant incident, not brought into contrast and conflict.

But when Montesquieu's famous triple separation of powers — legislative, judiciary, and executive — became practically accepted, why did not this separation of judicial and legislative functions lead to an issue, and to a general inquiry into its necessity? Because (we must infer) the spirit of the French Revolution had so emphatically settled the location of legislative power that the exclusive dominance of the parliamentary body as the declarer of law was placed beyond question, even for the judiciary, — and was bound to remain so for a long time to come. And the American Constitution enshrined this dominance.

But when the time should come that the personal aspect of the class-struggle had ceased even to be remembered, — when the judicial personnel had become practically democratized, by popular judicial elections or otherwise, the question of theory was ripe for fermentation. When any country to-day can look at its judicial body and at its legislative body, and see a hundred judges drawn from a professional legal class, and a hundred legislators drawn from the same professional legal class, distinguished from each other in no substantial respect of birth, education, class interest, or tradition, and employing more or less identical materials of thought

in their technical labors, — when the judiciary committees of the so-called legislatures are found carefully collating the bearings of judicial decisions and the so-called judges are seen expounding considerations of public policy, the question is then bound to present itself, in any community, sooner or later, Why are these men occupying separate posts? Why *are* there separate posts? Why do legislators legislate and judges judge? What *is* the inherent distinction between their functions?

No doubt there is a distinction. But just what is it? And what is its relation to the nature of law? And what separate processes and materials of thought does it impose upon each functionary? For, until we have satisfied ourselves on these points, we cannot expect to proceed practically to remedy intelligently any observed defects of operation in either.

Here we come, of course, to fundamentals, — the nature and processes of law, justice, judgment, legislation. Such is the connection which arises between the problem of the day and the philosophy of law.

The problem of legal method has become a specific one in jurisprudence substantially within about the last twenty years. Certain special inquiries which logically belong in this field (like that concerning codification) are very much older, and it is interesting to note that it was principally the codification of German private law in 1896 which served to attract writers in all departments of legal science to the problems of legal method. The literature has grown already to large proportions. The reserves of mental force which (it may be assumed) are normally in existence in any given country or countries in constant, if not calculable quantities, and which find expression in literary and scientific products, have, within this period, been diverted away from the

older conventional lines which brought to light intellectual outpourings on "Naturrecht," "Juristische Encyklopädie," and "Allgemeine Rechtslehre," and towards the problems of legal method. It would seem at any rate, to speak of the last fifteen years especially, that there has been a very considerable falling-off in books of the first type, and a large production of books of the second.

The French Civil Code of 1804 did not stimulate a similar intellectual movement; nor did the Austrian Civil Code of 1811 have that result. The explanation, however, is simple enough. The economic milieu then was largely non-industrial, society internally was more stable, and although the same problems then existed in form, at least, they did not rise to the level of juristic consciousness because of a difference of content. Furthermore, the strain of economic readjustment was absorbed by the legal machine without great effort, and especially so far as concerns the part of the French Court of Cassation.

We have suggested that the problems themselves, in form, are not new. That is true. We have only to look back to the age of Labeo and Capito to find in principle the modern problems of legal method. The immediate genealogy of the present luxuriance of writing in this new department of legal science, however, may be traced to von Jhering's "Scherz und Ernst in der Jurisprudenz" (1885) followed a little later by Kohler, and then followed by Gény and Ehrlich (1899, 1903), with whom the movement takes on a definite form. And the present volume aims to present, in an order suited to develop the various stages of the discussion, the most useful recent utterances of eminent jurists on the principal aspects of the problem.

Dividing the general subject under two heads — the Judicial Function and the Legislative Function — the chapters under the first head must, nevertheless,

inevitably concern themselves, at various points, with the relation of judicial decision to legislation. The chapters under the second head, assuming this dual aspect to have received clarification as to its theoretical foundation, proceed to deal solely with the problems peculiar to the legislative function.

The chapters of the first division — the Judicial Function — begin with the now celebrated utterances of Gény and Ehrlich on "freedom of judicial decision," — the two whose expositions awakened the entire Continent to the profound possibilities of the subject. These are followed by chapters in which Gmelin, Kiss, Berolzheimer, Kohler, Pound, Gerland, and Lambert have developed various principal aspects of the controversy, — notably the contrast between the English and the Continental judge, the subordination of the judge to legislative law, the scope of materials for judicial thought, the extent of judicial power of "interpretation," the doctrine of "gaps in the law," and the inherent logic governing judicial decision. The culmination is reached in Wurzel's chapter on "Methods of Juridical Thinking." He who has mastered this chapter has been born anew into a realm of clear thinking and perpetual disillusionment.

The chapters of the second division introduce us broadly but concisely to the fundamentals of the legislative problem. There is, however, as yet, little literature of a thorough-going critical character in this field. The future must see more, and America, not code-ridden as the Continent is, but fertile in a spawning mass of incoherent legislation, is the natural and needful place for its development.

Without attempting even to outline the many varied aspects of these chapters, we may in this preface notice some of the principal features that interest us in each of the divisions.

I. THE JUDICIAL FUNCTION

The knowing what is just and what unjust, men think no great instance of wisdom, because it is not hard to understand those things of which the laws speak. They forget that these are not just acts except accidentally. To be just, they must be done and distributed in a certain manner. And this is a more difficult task than knowing what things are wholesome. For in this branch of knowledge it is an easy matter to know honey, wine, hellebore, cautery, or the use of the knife; but the knowing how one should administer these with a view to health, and to whom, and at what time, amounts in fact to being a physician.

Aristotle, Nicomachean Ethics, v, 9, 1137a.

An interesting circumstance, which explains in part the difficulty of the problem in its practical aspect, is the contrast between the personal element in history and the jural element in theory. The theoretical purity of the problem is and always has been disturbed by the factional *status quo* of politics. When we find the Roman praetor deciding particular causes and also issuing general edicts, we realize that the course of Roman politics, in the struggle for power between consuls, tribunes, comitial assemblies, and senate, had resulted for the time in a pragmatic adjustment which left in the praetor's hands a portion of both functions, legislative and judicial. So, too, in France, the devious path by which the royal power became paramount in all fields under Louis XIV left the provincial Parlements in the possession of a limited portion of both functions; the recipe for the mixture being very different from that of the praetors. And again, in our own history, even after Montesquieu's triple distinction had come into common vogue theoretically, the traditions of the colonial legislatures and the alignments of local politics

sometimes found the early state legislatures indisposed to observe the distinction; as, for instance, in Rhode Island, where "originally the General Assembly seems to have considered itself a court as well as a legislature,"[1] and this attitude was not abandoned until after the decission of *Taylor* v. *Place*, in 1856[2]; for in this community the actual personnel of the Legislature, moved by local partisan strife, was evidently ready to exercise the judicial function. And, still more notably, the success of Marshall in vesting the federal judiciary with the revision of legislative statutes on constitutional grounds, and thus in preserving a legislative veto for the judiciary, was an expression of the deeper struggle between two political parties holding antagonistic convictions in the broader field of general politics.[3]

Thus, we see, the actual allotment of the detailed portions of the legislative and judicial functions varies at a given time and place, according to the then state of equilibrium of political interests; which in turn involves personnel, traditions, and other independent considerations. In short, the actual solution of the problem is and always has been complicated by historical and personal issues. In pure theory it is never presented.

None the less, it is possible and necessary to treat it as a question of theory, and to inquire into its general elements, common to all times and places.

There seem to be at least four distinct and large questions involved.

[1] Quoted by Chief Justice Durfee from Justice Stiness in his essay on Samuel Ames (*Lewis'* "Great American Lawyers," v. 301).

[2] 4 R. I. 324.

[3] Marshall was "by far the most popular Federalist in Virginia, perhaps in the United States" (*W. D. Lewis'* "Great American Lawyers," ii, 337).

1. Is it inherently necessary that the judge should be subordinate to the statute? Let us call this, for short, the question of *Judiciary Subordination.*

2. Even if he is, where does the control of the statute stop, leaving him free beyond that point? Let us call this the question of *Judiciary Interpretation.*

3. So far as he is free, how far is he controlled by his own prior declarations? Let us call this the question of *Judiciary Statification.*

4. And, so far as he is not so controlled, what does furnish him any other guide or control, superior to his own momentary and unformulated sense of justice? This we may call the question of *Judiciary Rectification.*

Let us look a moment at the first question:

1. *Is it inherently necessary that the judge should be subordinate to the statute?* — the question of Judiciary Subordination.

To get the proper point of view, we must here make some assumption as to the use of terms, i.e., the distinction of ideas implied in "judicial" and "legislative". There certainly are two distinct processes.

One is the process of (1) formulating a rule in more or less general terms, (2) because of certain policies deliberately deemed to be controlling; i.e. (1) formulation (2) to effect a felt purpose. This we may assume to be the essence of what we usually call "legislation."

The other process is that of deciding, by an agent of state power, a controversy existing between two individuals (or the State and an individual), by rational (not merely personal) considerations, purporting to rest on justice and law (i.e. the community's general sense of order).

Now these two processes might conceivably be performed by the same person or group, and have often

been so performed, in variant shares or allotments, and the first inquiry that arises is whether they ought to be so merged, in any degree. But, for the purpose of theory, we may now assume that this question has been settled; and that it has been settled on historic and political grounds, by allotting, provisionally and primarily, the whole of the one process to one person or group of officials, and the whole of the other to another person or group. And we may ignore for the moment the logical difficulty to be mentioned under the next head (due to the inherent abstractness of legislation). We shall then come to the question: Does it work?

That is to say: *If* the legislative process were officially so organized that it *worked perfectly*, no occasion would arise for asking whether the judiciary could be freed from subordination to it. If the legislative body were to sit continuously, were to deliberate all-wisely, and were to formulate correctly and consistently, the judiciary process could be left to operate in simple subordination, by merely applying the rules to concrete cases. For whenever an exception appeared to be needed, or a change to be desirable, there would be instant reference to the legislative body, and its all-wisdom would supply the needed rule or exception, properly framed.

But the *legislative process never does work perfectly.* The legislative officials sit intermittently, deliberate hastily and unwisely, and formulate inconsistently. Moreover, they do not in the traditional Anglo-American State (nor in many others of history) legislate comprehensively on all topics, but only on some of the topics. Under such circumstances, then, should the legislative formulations be accorded a supreme domination? To accord such supremacy if the process even purported to work perfectly would be conceivable.

But to accord it when the process is so imperfectly organized seems absurd, — one of the absurdest things that history ever allowed to occur. To vest with absolute steel-bound rigidity a system so irregular and limping in its machinery is as curious a notion as to send a steamship to sea with only half of its machinery put together.

From this point of view, therefore, it is entirely proper to raise the question whether the officials vested with the judicial process must not inherently be given some independence of the legislative declaration, i.e. the statute. And Anglo-American history illustrates copiously how the judiciary have in fact occupied themselves at all times with declarations of law independent of statute, i.e. with genuine legislation. That they have done so is now seen to be nothing but an inevitable consequence of the imperfect organization of the legislative process in separate hands.

There is here, to be sure, a special question whether the judiciary should not be purely subordinate to the legislative declaration at least in those parts of the field of law that have been expressly covered by the latter. But even here, in view of the imperfect legislative machinery, the question is a fair one to raise whether the intellectual weight of the legislative sanction deserves such rigid supremacy. Here, as elsewhere, what has given it that supremacy, historically, has been its political (not its intellectual) weight; i.e. when the dominant public demand has expressed itself through the legislature, all officials must yield to it, — not because it is intrinsically meritorious, but because it represents the demands of actual power.

But such express demands of actual dominant sentiment are not usual. The mass of legislation in modern times represents merely the views of thirty or forty

members of a judiciary committee of the legislature, on multifold details totally unknown to public sentiment. Should such legislative declarations have sacrosanct dominance over the judiciary?

Incidentally, at this point, as well as later, arises the question, Can we trust the judiciary with such a freedom? Must we not bind them by statute? Should we be safe otherwise, in view of the judicial personnel as it is composed in our time and place? No doubt this is a question whose answer may vary at different epochs and in different countries. Evidently the Roman praetor, for example, was trusted more than our modern judges are trusted. But enough here at this point, where the question is merely between judiciary and legislature, to insist that this question for us is not merely whether we could trust the judges, but whether we would rather trust the judges than the legislators. If it is to be a mere question how a dominant declaration of this or that rule of law will be most safely formulated, will the ordinary judiciary committee of a legislature be more safely trusted than the ordinary bench of supreme judges? If we are to attribute a sacrosanct domination to some official declaration of law, we must frankly face the facts of present practice, and not proceed upon some imaginary and theoretical state of facts. As laws are to-day actually made, what is the special guaranty of supreme wisdom furnished by the usual operations of a judiciary committee of the legislature?

Such are some of the considerations that arise under our first general question, that of Judiciary Subordination.

2. Even if the judge is subordinate, *where does the control of the statute stop, leaving him free beyond that point?* — the question of Judiciary Interpretation.

This question has so many angles of approach that one must be content to note only a few of them.

(1) In the first place, where *ought* the statute to stop? Should it descend into details, or should it remain in abstractions as much as possible? Should it be satisfied to proclaim "Thou shalt not steal!"; or may it well attempt to describe and prohibit multifarious varieties of stealing?

This, of course, is not strictly involved in the present question, but concerns rather the Legislative Function (post, p. xliii). Suffice it here to lament that our legislative traditions have never evolved a method, such as the French have evolved, of debating great questions "en principe," as they say. Our own more practical tradition, that of debating the fundamental principles only when presented as an issue of textual detail, has rendered a great service by dispelling obscurity of views and by forcing practical issues. But the over-emphasis of it has lost a valuable feature of wise legislation. For example, in the debates of the National Conference on Workmen's Compensation Laws, in 1910, much was gained, in time and clarity, by framing one of the issues thus: "Shall the law be optional or compulsory for employers?" By this means, the textual details were removed from needless dissension until the main issue had been settled.

(2) In the next place, where *does* the control of the statute stop? Is the legislative intent the sole criterion?

Here a broad field of variant views is opened. Literally hundreds of views can be found.[4] Let us here note merely a few of the conventional assumptions that are questionable.

(*a*) One of the most interesting conventional assumptions is that there is an actual legislative will at all.

[4] See an interesting article by Professor *M. R. Cohen*, "The Process of Judicial Legislation" (American Law Review, xlviii, 161, 1914).

If there were, it would have to be somewhere existent in some persons. Now it does not exist in the voters at large; for only an infinitesimal number of them are beforehand acquainted with the terms of the bill; and they cannot will what they do not know; the most that they ever will, as a mass, is the general principle, e.g. to lower the tariff, not to raise it; or to abolish imprisonment for debt, not to preserve it. Nor is that will to be found in the legislators as a body; for in nine cases out of ten, they do not know or care about the terms of the bill for which they vote. In the last analysis, therefore, the only actual legislative will is the will of a few individuals belonging to the drafting committee.

The candid and realistic acknowledgment of this fact has surely some bearing on the extent to which the judiciary should be held bound to ascertain and to respect the "legislative will."

(*b*) Another conventional assumption is that this "legislative will" is a simple undifferentiated thing. In fact, there are distinguishable at least three suggestive elements, — the will or intent, the meaning, and the motive. There is a will or intent to use certain words. There is also a meaning or sense attached to those words. And there is a motive or object desired to be attained by those words. In the interpretation of the documents of private law this distinction is a familiar and important one.

The first element, the will or intent to use certain words, seldom gives opportunity for doubt in dealing with legislative enactments.

The second element, the meaning or sense of the words, in particular or as a whole, begins to open a wide field for speculation. By the general principle of interpretation in private law, the objective standard now becomes dominant; i.e. not the word-usage of the

individual, but that of the community, may be controlling. Here the judiciary function obtains a large scope.

The third element, the motive or object desired by the legislators, opens a still wider field. Here the individual motive of the legislator or voter may cease to have any value for purposes of control, not only because it is often unascertainable, but also because it is so variant. An amusing illustration is afforded in the votes at a presidential election. The chronicles of the daily newspapers show that out of any hundred voters, of whom fifty are declaring for Mr. Wilson and fifty for Mr. Hughes, each respective fifty express the most variant and conflicting motives for their votes. Only their votes agree; their motives may have nothing in common. If the vote were to be taken on each one of the twoscore motives or objects assigned, and not on the simple choice between two men, the alignments of the hundred voters would differ on each of the two score of ballotings. What does this illustrate? That to control the judiciary by the supposed motive or object of the legislators is to prescribe a standard impossible of practical use, except in an occasional clear and undisputed instance.

(*c*) And this brings us to another stage of the inquiry, — to the question whether, since the legislator's subjective standard of motive or policy is an impracticable criterion, an objective standard may properly become available, viz., either the general policy as felt and conceived by public opinion at large with specific reference to the legislation in question, or the general policy of the needs of the community as determinable by the judiciary themselves.

Needless to say, public policy in one of these senses, is and has been and always will be more or less considered by the judiciary. The question for the jurist is:

Where does this criterion belong in the orderly scheme of Judiciary Interpretation? What are the just and knowable limits for its invocation?

Enough here to suggest that this question cannot be answered without first testing the validity of some of the conventional assumptions above noted.

(3) In the third place, how far is legislative language *inherently incapable* of controlling the judiciary?

This involves the logical nature of jural thinking. Words are but symbols. They compress into a single symbol a complex process of thought, and compression signifies exclusion. Thus the person whose duty it is to apply the words of a statute must reëxpand the thought when applying it. And thus arise unlimited opportunity and necessity for the judiciary to reconstruct the thought by its own standard of experience, which may and must often differ from that of the legislators. If we recollect the differences of personality and community, and add to those the differences caused by lapse of times and change of environment, we shall realize that words are far from fixed things; they are the most fluent and indefinite of things.

There used to be an ancient milestone in the town of Cambridge, Massachusetts, opposite Harvard College; and on the imperishable granite was engraved in sturdy crude characters: "1734. Boston, 7 M." Now for the students of the college it was a perpetual wonder how that milestone-maker could have proclaimed the falsity that Boston was seven miles away; for it lay plainly in view only three miles away across the Charles River, by easy walk across the bridge. But the antiquarian could have told them that in the year 1734 Boston *was* seven miles by road from Cambridge; for the bridge did not exist in 1734, and the traveler must pass by a long detour up the river bank to a crossing,

which made his journey seven actual miles, as the milestone-maker faithfully recorded. Time had deprived his words of any true meaning.

This logical impossibility of fixing thought by a word is of course most strikingly seen in these changes generated by time, — in the questions whether automobiles are "vehicles," under laws of sixty years ago requiring towns to maintain roads in good repair for vehicles; whether phonographic disks are "copies" of music entitled to protection under a statute enacted before the phonograph was imagined; and so on. But it is also inherent in enactments not affected by changes of time or place. The citizenship of a corporation under the Federal Judiciary Act; the scope of a workmen's compensation act defined as applying only to injuries received "in or about" the place of employment; the voidness of a bequest to a will witness who is a "beneficiary" under the will; these and a thousand other instances illustrate the truth.

But this is only the simplest form of the difficulties that arise from the inherent logical impossibility of controlling the judiciary by the words of a statute. For its more subtle aspect, and its more profound origin, the reader is referred to the masterly essay of Dr. Wurzel, on "Methods of Juridical Thinking," included in this volume.

3. A further great inquiry is *How far is the judge controlled by his own prior declarations?* — the question of Judiciary Statification, of *stare decisis*.

Here one asks at the outset, Why should the judge be expected to follow his own prior declarations? And the immediate answer, of course, is: Because the inherent nature of Law as contrasted with non-law lies in its *uniformity;* and a fundamental postulate of our

system is that Justice (the settlement of the individual's share of anything in life, when disputed by another individual) is to be sought through Law.

Reserving the right to ask whether uniformity as an element of Law (the abstract) necessarily involves uniformity as an element of Justice (the concrete), we may proceed to ask, What are the advantages attributable to uniformity? And here the answer generally conceded seems to be that three desired advantages are thus secured: viz. Equality, Stability, and Certainty. So that our question becomes: How far does *stare decisis* tend to secure equality, stability, and certainty?

(1) Equality is not a product for which *stare decisis* is necessary. Equality is something desired for the persons *now* under the law; it does not call for sameness of treatment between those of the present and those of the past or the future generation. Gompers need not receive equal law with Hampden or with the citizen of Utopia, provided he receives equal law with Harriman. Allowing, therefore, a short time before and after now as necessary for the consciousness of equality with our own generation, equality calls for no longer period of *stare decisis*.

(2) Stability is indeed a product of *stare decisis;* but the converse proposition, viz. that *stare decisis* is invariably necessary to stability, is not true, and yet this converse proposition is the one ordinarily implied. In so far as the faith of contracts is involved, and the security of property, there must be adherence to prior declarations of law *in so far as such faith and such security have been rested upon them*, but so far only. And does a change of rule in a new concrete case necessarily affect prior contracts and properties? If a Supreme Court to-day holds that a contract is formed by deposit of an acceptance in the mail box, changing from the rule

that arrival of the acceptance forms the contract, may not this leave valid all relations effected before the promulgation of the decision? In other words, stability is wanted for the sake of the concrete relations of individuals, not for the sake of the abstraction; and the former can be preserved, by exception, without preserving the latter. The legislature makes no scruple of following this distinction; every volume of session laws contains statutes ending with the proviso that "this act shall take effect from January first, and shall not be applicable to any contract made or cause of action accrued prior to that date." Why could not the judicial doctrine of *stare decisis* be applied with the same restriction? It would be an interesting experiment.

(3) Certainty is the third supposed virtue of *stare decisis*. The theoretical value of certainty, and the best feasible method of securing it, are interesting questions. But it is difficult to reflect on this part of the question without emphasizing the pragmatic element. For the inquiry presses, How far indeed has certainty been secured by our practice? Would a less frequent invocation of *stare decisis* have given the community less certainty in justice? Is the degree of the present obvious lack of certainty due to other causes, or to the inherent impotency of *stare decisis* for that purpose? In countries like France, which started a century ago with the negation of that principle, but gradually came to recognize it to a degree, has there been adequate certainty?

And, if we look away from the community at large to the profession of law practitioners, how far may we suppose that the laudation of certainty has been due in part to mere mental convenience of the profession? Such a naïve confession as that of Lord Ellenborough we do not often receive, but its significance is radical: "If

this rule were to be changed, a lawyer who was well stored with these rules would be no better than any other man that is without them."

There is much more to this theme. But again it is a place where conventional assumptions must be challenged. And the essays in this volume supply that challenge.

4. And still another question remaining is, *What can furnish the judge any other guide or control, superior to his own momentary and unformulated sense of justice?* — the question of Judiciary Rectification.

The judge must be "rectified," we all assume. That is, in applying abstract Law to do concrete Justice, there must be some standard of guidance for him. We do not want the meaningless Justice of the traditional Arabian sheikh, — the justice of individual whim and momentary notion. If, then, he is not to be mechanically controlled by statute and by precedent, what shall be the substitute?

The relaxation would not necessarily be as cataclysmal as it might seem. There will always be a controlling influence by the abstract law, wherever a professional class fills the bench. This has been so from the time of the priest-judges of primitive times until to-day. Moreover, there is a large material furnished by common sense (common and undisputed, that is) and by common policies. Beyond this lies a field of questionable scope. And no doubt there is room for speculation as to the use of this field by the judges. Can they safely be turned loose into it? This is the problem of a "freie Rechtsfindung" and "libre recherche," the needs and dangers of which are discussed in this volume by the trenchant pens of Gény, Ehrlich, and other jurists.

Let us not minimize these dangers; let us merely not exaggerate them. And, for consolation in the prospect of them, let us recall at least two relevant circumstances:

(*a*) In the first place, our own Supreme Courts have long been drawing copiously and consciously from this unbounded field of public policy. The opinions are full of such discussions, and some of the greatest questions of the day have been settled with no more definite guidance and control. Examples taken at random are the decisions settling the law of illness caused without impact (nervous shock, "railway spine," etc.) where the known conditions of modern personal injury litigation have furnished the main grounds of judgment; the law of releases signed by patients in a hospital, where the apparently fixed principles of documentary execution have been subordinated to the policy applicable to such a situation; the law of privilege for torts in general, where modern conditions have at many points required sole reliance upon neither precedent nor statute. And this list might be indefinitely enlarged. An extension of this field of "libre recherche" would be no novelty in method.

(*b*) In the second place, the judge's liberty could in any event not exceed that of the legislators, whose liberty (and license) of reasoning we have long viewed (and suffered) with equanimity. Reflecting on the debate that occurs in a judiciary committee of the legislature, when an ordinary measure of private law is presented, what is the range of reasoning? What of the personal oddities, the maddening irrelevancies, the ignorant assumptions, the crude philosophies, the fragmentary conceptions, the narrow outlook, the obstinate bias, the stolid indifference to facts and needs? These legislators, in their motives and reasonings for a declaration of law, have a "libre recherche" indeed. But

we have accepted it as a matter of course. Why not accept it for the judges also?

This part of the problem after all is not so troublesome, perhaps, as another part, viz. the necessity for drawing the line. A line must be drawn somewhere (by hypothesis) between the judiciary operation and the legislative operation, — so long, at least, as separate officials are maintained for the two general purposes. Now when a concrete case is presented to the judge, in what classes of cases should he refrain from "libre recherche," assuming that no statute is involved? How shall those classes be defined?

For example, if an action of nuisance were to be brought against a liquor-seller, but no statute be produced declaring liquor-selling to be illegal, might a court, if it entertained the conviction that liquor-selling was deleterious to the local welfare, and that this liquor-seller's business in particular was of that quality, declare such law and restrain the further conduct of that business? That particular topic has hitherto been deemed to be subject only to legislative declaration of law; and the policies pro and contra have formed public issues on which legislatures have been elected. We may suppose that any definition of the line between judiciary and legislative functions would desire to allot this topic to the latter. But what definition will dispose workably of that and like topics?

Here we get a glimpse of an important argument against the extension of "libre recherche" — free range of decision — for the judiciary. That body's function of doing Justice can best be performed in independence, free from the pressure of public clamor. If then we permit them to enter (more freely than now) the field of public policy, we subject them to the loss of that very independence which on other grounds we seek to

secure for them. The legislature is the body that responds to momentary public opinion and registers the will of the majority. Do we wish another body to duplicate that function? Do we not need one body of justice-dispensers which shall be primarily concerned with the technical material of the law, and independently engaged in developing it? Does not the vital difference between judiciary and legislature lie in the fact that one should be responsive to popular opinion and the other should be independent of it? And, if so, can we guarantee this in any other way than by our traditional system?

There may indeed be a fallacy here, in these questions. For is it correct to assume that even the legislators ought to be responsive to current public opinion? Is that consistent with representative government? Should Demos be voiced directly on the legislative benches; or does not the best tradition of our forefathers demand rather that the legislator should be an independent thinker, expert in the subject for legislation, a guide, and not a mere messenger for the mass of the voters?

These questions disclose, at any rate, the complexity of the problem, and verge closely upon our next theme, — the Legislative Function.

J. H. W.

II. THE LEGISLATIVE FUNCTION

Everyone, it is true, may frame an hypothesis as he pleases, but yet it ought to be practicable.

Aristotle, "Politics," bk. ii, ch. vi, 1265a.

Problems of legislation touch the field of science in two ways: in matters of form, and in questions of content; or put in terms which are beginning to find acceptance and definite meaning, these problems are those of legislative technic and of legislative policy.

In this volume a number of chapters treat the difficulties, or some of them, of legislative technic; but little will be found, except by way of suggestion, as to legislative policy, i.e. the kind of legislation which the State should attempt, or the method which should be pursued in developing legislative ideas. This lack of specific cultivation, in this volume, of questions of legislative policy is not merely accidental, but appears to be due, primarily, to the silence of literature[5] —

[5] A number of volumes, in truth, may be found which bear the hopeful titles "Principles of Legislation," or names of similar import; but, unfortunately, none of these works treats legislative policy in a logically comprehensive manner, or even points out the methodological criteria of what legislation should or may accomplish. See *Mably*, "De la législation ou principes des loix," Amsterdam, 1777: also in his "Œuvres," 15 vols., Paris, 1794–5; *Justi*, "Grundsätze der Policeywissenschaft," 3d ed., Göttingen, 1782; *Filangieri*, "Scienza della legislazione," Napoli, 1783: also in his "Œuvres," 5 vols., and commentary by *Constant*, Paris, 1832; *Bentham*, "Principles of Morals and Legislation"; *Comte* (*Charles*), "Traité de la législation," 4 vols., Paris, 1835; *W. Jethro Brown*, "The Underlying Principles of Modern Legislation," London, 1912.

It is quite true, however, that from the vast literature dealing with expository, philosophical, and historical views of Law, Society, and State, a large number of ideas might be gathered which would represent, among the rest, such names as Plato, Aristotle, Vico, Aquinas, Montes-

a silence which may seem, in the great multiplication of books and essays, and the wide diffusion of ideas of every sort, a strange, if not unbelievable situation.[6]

I. The intellectual effort of the centuries devoted to the theoretical side of legal institutions has centered on such questions as the concept of justice, the nature and sources of law, the origin of government, the best form of the State, the idea of sovereignty.

The natural law view has had, and continues to have, a dominant position in these studies, and has, unfortunately, distracted attention from the *what is* to that, which, by supposition, in the order of nature or of reason *ought to be*. The facts of life have been taken for granted by this attitude. It has been assumed throughout not only that the phenomena of society are fully understood and within the grasp of that quality of mind which more than once has claimed all philosophy for its province — common sense — but, also, that these phenomena are at all points under the potential control of lawmaking. Nothing is more familiar than the naïve thought that a social evil, real or apparent, being discovered, nothing further remains than to enact a law of some sort, whereupon the imperfection aimed at may be expected automatically to disappear.

On a basis of procedure in close connection with these misconceptions, the task of legal science was thought

quieu, Savigny, Herder, Buckle, Bentham, and Tarde, or to call upon the volumes in this series for inspiration, the names of Ehrlich, Gény, Jhering, and Kohler. But to make a selection of coherent ideas from sources so diverse in starting-point and outlook would of itself involve a creative effort comparable to an original statement and elaboration of the essential problems.

[6] One important exception must be noted in *Kohler's* "Lehrbuch der Rechtsphilosophie," translated in this Series (by Albrecht), which appears to be the most profound systematic contribution yet offered in the field of legislative policy. The value of this work deserves to be better recognized.

to be that of *explanation* or *criticism* of legal institutions in the light of *nature* or of *reason*.

It will be convenient to discuss the last proposition, before attempting to deal with the problems and the methods of legislative policy.

1. First, legal phenomena were thought to be *explainable* as purely *natural* phenomena, with laws analogous to, or even identical with those of the physical sciences.[7] In a purely mechanical sense there were in the evolution of legal phenomena "corsi"[8] and "ricorsi" and even spirals[9]; in a biological sense,[10] heredity, selection, differentiation, and survival.[11] Neither do we question that such explanations, in their larger bearing, are both interesting and important, nor, in the same amplified meaning, that these speculations are based on an element of truth indicating an intimate mutuality and relation among all the facts of life and nature. The subject is one which has been so often and so fully considered that it is sufficient here merely to suggest these theories with qualified adhesion to their scientific value, and to point out, what is important for our present purpose, that this immobilism of social phenomena, to the extent that such phenomena are held

[7] Derivation of language by reference to a physical basis is an interesting illustration of the same idea. *Jus*, to take an example in legal terminology, is thought to be traceable to the Aryan root *Yu*, meaning to bind or join together. See *Jhering*, "Geist d. röm. Rechts," i, 218 (6th ed. 1907); and contra *Bréal* in Nouv. Rev. Hist. vol. vii (1883), 625.

[8] Cf. *Vico*, "Scienza nuova"; cf. *del Vecchio*, "Formal Bases of Law," pp. 27 seq.

[9] *Grasserie*, "Principes sociologiques du droit civil," Paris, 1906; "Principes sociologiques du droit public," Paris, 1911, p. 13.

[10] Cf. *Kuhlenbeck*, "Natürliche Grundlagen des Rechts und der Politik."

[11] In this connection, see, for an application of ideas of organic life to the social composition, *Schäffle*, "Bau und Leben des sozialen Körpers"; *Spencer*, "Principles of Sociology"; *Espinas*, "Les Sociétés animales," p. 128; *Demoor, Massart*, and *Vandervelde*, "Evolution by Atrophy," (Mrs. Mitchell's tr.), N. Y., 1899, pp. 7 seq.

within its iron grasp, holds in check also the legislator, bending his will to the prevailing recoil of life, or breaking it when it stands in opposition to its superior force.[12]

2. Again, the attempt has been made, not simply to explain legal phenomena on the basis of unconscious nature, but to *evaluate* them by *nature*, predicating of legal ordinances and legal institutions, the quality of good or bad, as they conform, or fail to conform, to the natural order of things.[13]

It is clear that the law to be workable must recognize the order of nature in delimiting rights and duties, liberties and powers, and capacities and incapacities. To invest an infant with regal power, while an important ceremony for continuing hereditary succession, is of no significance otherwise at the moment. Legal relations to a very considerable extent are fashioned by the pattern of successfully asserted natural wants, capacities, and conditions of life. This appears plainly in all legal institutions and especially in a direct way in the field of the law of persons.[14] The various forms of kinship relation, marriage restrictions, family, clan, and tribal duties — matriarchy, patriarchy, exogamy, endogamy, the levirate, patria potestas, agnation, perpetual

[12] Incidentally, this point of view has the juristic mission of invalidating the imperative theory of law in its application even to civilized societies. Cf. *Maine*, "Early History of Institutions," Lects. 12, 13; *Bryce*, "Studies in History and Jurisprudence," ii, 44; *Salmond*, "Jurisprudence," 3d ed., pp. 48 seq.

[13] Thus, from this standpoint, *Aristotle* recognized a class of slaves who were such by nature. "That being who by nature is nothing of himself, but wholly another's, and is a man is a slave by nature; and that man who is the property of another is his mere chattel, though he continues a man": "Politics," cap. iv, 1254a seq.

[14] Cf. Dig. 1, 1; 1, 5, 14; 1, 5, 24; 1, 7, 1; 1, 8, 2; et passim. Thus, it provided (Dig. 1, 7, 15, 3): "Moreover, a man ought not to arrogate someone else's freedman, *nor a person who is older than himself*; as (16 h.t.) the adoptive relation is only allowed between those persons between whom the natural relation might by possibility have existed." Therefore, Cicero says, adoption of an older person is not only "contra fas" but "contra naturam."

tutelage, clan fraternity — together with their modern developments no doubt found their earliest suggestion in a *rita* discoverable, or thought to be discoverable, in external nature.

Process of time has materially altered the interpretation of nature, and on individual questions, such, for example, as that of human servitude, conflicting ideas of natural reason have sprung up; but the fundamental thought of the ancients (apart from religious commands and economic considerations which must have an explanation of their own), that restrictions upon liberty in the field of personal relations have an objective natural basis, remains valid into the present day.[15] The varieties of matrimonial régime, disabilities of minors and married women, guardianship, support statutes, and the like, are patently based on natural incapacities, and natural duties, or powers.

In this direction, however, some fanciful explanations have appeared which attempt to explain or to criticize the rules and institutions of positive law by way of analogy with, or description of, the phenomena of the external world.[16] The facts of nature cannot be ignored,

[15] This objective basis of human relations represents the classical concept of natural law. See *Gény*, "Science et technique en droit privé positif," ii, 274.

[16] *Pythagoras* furnishes one of the earliest examples. According to him justice is the *equally equal* number. Various interpretations have been given of this formula, and numerous attempts made to select the specific number intended. In passing, one more solution may be here recorded. The magic number symbolizing justice may well be the digit 9, which will be found, by the various manipulations to which it submits, always to result in itself. Thus $1+2+3+4+5+6+7+8+9=4(+)5=9$. Again $9+9=1\,(+)\,8=9$. And $9\times 9=8(+)1=9$. Lastly, progressive multiplication of the digits ($1\times 2\times 3$, etc.), and final multiplication or addition of the result, gives the same answer. Cf. *Berolzheimer*, "The World's Legal Philosophies" (Mrs. Jastrow's tr.), pp. 52 seq.

Illustrative of the proposition under consideration, it was said by Comstock, J. in *Kimberley et al* v. *Patchin*, 19 N. Y. 330: "No person can be said to own a horse or a picture unless he is able to identify the

but it is always a token of an immature legal development when the juridical sphere is dominated by or confused with other fields of thought.[17] Juridical law is autonomous, and as a human institution designed for regulation of human relations, it cannot be governed by nature or external facts any further than these facts are themselves manifested in legal relations.

The last stronghold of the influence of alien fields of thought upon the making and application of legal rules is the domain of the ancient formal sciences, logic,[18]

chattel or specify what horse or what picture belongs to him. It is not only legally but logically impossible to hold property in such things unless they are ascertained and distinguished from all other things." This rule, the court says, may be "fitly called a rule of reason and logic."

The concept of equivalence taken from nature has been a very important factor in the construction of legal rules. A complete investigation of this idea would be interesting and valuable. A single instance may be tendered. In the old common law an instrument under seal could only be discharged by a like instrument. Performance did not suffice (*Leake*, Dig. Con. 877).

A recent writer arrives at some remarkable conclusions based on natural law; e.g. that a foetus is owned by the mother and that the law has no control in the matter until it becomes a legal subject: *Poche*, "Die Stellung des Kindes gegenüber den Eltern vom Standpunkte des Naturrechts," Berlin, 1907.

A further illustration of the text is furnished by descent per stirpes. See *Kohler's* description of "Stammteilung" in his "Lehrbuch der Rechtsphilosophie," 135. For a variety of other examples showing that natural law was regarded by Roman jurists as a part of positive law, see *Korkunov*, "General Theory of Law," 123 seq.

[17] The confusion in early codes of regulations of what, in a later period, are called liberties, with duties, has often been pointed out. See, particularly, the Pentateuch, Code of Manu, and the Koran. Cf. Dig. 1, 2, 8, et seq. The present-day tendency seems again to be in the direction of narrowing the field of liberty. This tendency may be expected to increase to the extent that modern society inclines toward the solidarity of primitive ages. The psychologic basis of this movement will, of course, be entirely different from that which actuated primitive man. The primitive "law of participation" which had a mystical quality which ignored the logical rule of contradiction, will be replaced by a material law of participation founded on economic concepts. Cf. *Lévy-Bruhl*, "Les fonctions mentales dans les sociétés inférieures," Paris 1910, pp. 68 seq., 425.

[18] There is another abuse of logic which is as objectionable as the kind above pointed out. It consists in the over-refinement of distinctions to a point where the law in its system becomes too esoteric even for the

mathematics, and mechanics. The maxim that every beginning or change must have a cause is comparable to the rule of no liability without fault. The rule that something cannot come from nothing has its counterpart in the doctrine that one cannot transfer more than he owns. The law of excluded middle, that everything either must be or not be, which presents sufficient opportunities even in the field of logic for misapplication, as every undergraduate knows, has been carried over into many rules of law. In fact, the entire field of common law is one of excluded middle.

The Euclidean mathematics and the Aristotelean logic now appear to be in discredit, but in an earlier generation they doubtless have exercised an important part, in the manner suggested, in the construction of juridical rules by way of analogy and description. The difficulty of their employment in the law lies first, in the narrowness of their operation, and second, in a difference of objects to be attained by these formal sciences, on one hand, and the law, on the other. This may be illustrated by the fact that where in logic there are two possible alternatives, three will be found in mathematics, and an indefinite number in jural relations.[19]

3. In the effort to *explain* legal institutions by *reason* a purely deductive position is taken. Thus as del Vecchio puts it, "the formal concept of law is implied in the knowledge of any juridical fact whatsoever" . . . , it "is not created by the fact in

learned. The case system of law lends itself especially to this tendency, where distinctions urged by the necessities of counsel have in some fields reached the point that logical generalization is impossible, and each case, in effect, in that field, is a general rule of law. See, for an example of this, *Calumet and Chicago Canal and Dock Company* v. *Conkling*, 273 Ill. 318.

[19] The necessity of the deductive method for making practical and comprehensible the data of legal science is, of course, admitted. The point under discussion will not be confused with that question. Cf. *Cohen*, "The Place of Logic in the Law," 19 Harvard Law Review 622 seq.

which it attains concrete existence."[20] The attitude here represented is entirely unhistorical, and, in the main, unfruitful for legislative objects. It may well be that mathematical or logical form constitutes a *prius*, but it follows, by no means, that the content of these forms is determined by preëxistence of form. It is conceivable that organic life may exist without the social phenomenon of law, and to assert under such conditions the logical priority of law, requires the assertion equally, for the sake of consistency, of all other possible relations and conditions.[21]

Law is not a supernatural product or an issue of pure reason; it is not even the mandate of a sovereign, or the will of the people. We shall not here add another effort to hundreds of attempts to define the law[22]; but we urge with considerable confidence that the standard of intellectualism unaided by experience, at one pole, or fortified (by rare possibility) by intuitional insight, at the other, can never become a profitable basis of action for the legislator; and that such a procedure can have no beneficial practical issue except on the basis of disguised motivation.[23]

[20] "Formal Bases of Law," cap. x.

[21] The objection of *de Maistre* quoted by *del Vecchio* (op. cit. p. 117) and said by him (*del Vecchio*) to rest on an old sophism, has all the appearance, although in left-handed style, of a complete answer to the attempt to make a universal of the concept law. *De Maistre* says: "I have seen in my life, Spaniards, Italians, and Russians, and I even know, thanks to Montesquieu, that there are Persians, but as to man, I declare that I have never come across one in my life. If he exists, I don't know it."

[22] For collections of definitions, see *Rümelin*, "Eine Definition des Rechts"; *Baumstarck*, "Was ist das Recht?"; *Holland*, "Jurisprudence" 11th ed., pp. 20, 43; *Korkunov*, "General Theory of Law," (Hastings' tr.) pp. 79 seq.; *Trendelenburg*, "Die Definition des Rechts"; *Pound*, "Theories of Law," Yale Law Journal (Dec. 1912).

[23] Berolzheimer has pointed out the great social and political importance of this principle, giving credit for priority of statement to *Georg Adler*, "Die Bedeutung der Illusionen für Politik und soziales Leben," Jena, 1904 — "The World's Legal Philosophies" (Mrs. Jastrow's tr.), p. xliv. It may be suggested that the same idea is universal in nature,

That illusory ideas and programs scientifically untenable are able very frequently to produce results in the world which are, or at least appear to be, valuable in the light of finite wisdom has often been manifested. It was the deductive method with its theory of personality sprung from the virgin fountain of pure reason which served to free the State from the Church, established a theoretical equality among States, and gave a philosophical tone to the eighteenth century declaration of "rights of man" embalmed in political documents of the age. The after-effects are clearly visible at the present moment. These ideas did not take and retain hold in the political and economic life of the German States as in the Latin countries and in Anglo-America, and the result has been translated into what appears to be a contest for commercial supremacy which is now in the process of arbitration by the most ancient of courts — the Supreme Court of War.[24] The rôle which these concepts have played in the private law of Common Law countries, and the difficulties which have been encountered in a conceptual change of front from individualism to socialization of legal institutions, a movement which is only in the beginning stages, are chapters in a narrative which in recent years has been made quite familiar.[25]

as may be seen for example in the inversion of the image on the retina, the apparent motion of the sun around the earth, refraction of light, protective coloring of plants and animals, etc. Deportment, morals, and fashion are so completely saturated with this principle that it may be said that they have no other rationale. Cf. also, *Dernburg*, "Die Phantasie im Rechte," 2d ed., Berlin 1894.

[24] "That ideas are more effective and important agencies in human affairs than events however massive — that the Justice of Plato, and the Law of Nature and of Reason of the Stoics, will continue to influence men's thoughts and actions long after all Pragmatic Sanctions and Golden Bulls are dusty and forgotten — this is a conclusion willingly embraced by most philosophers, and by some historians." — *Hollands*, "Nature, Reason, and the Limits of State Activity," 25 Phil. Rev. 645.

[25] In America, especially by *Pound*. See his "The Scope and Purpose of Sociological Jurisprudence," Harvard Law Review, 1911–12, among numerous other writings of the same author.

That the attempt to explain the edifice of law by reason is one of the numerous variants of natural law also hardly needs to be mentioned.[26]

It is assumed, furthermore, by the point of view under inspection, that history is the more or less perfect development of metaphysical purpose, of idea,[27] of an innate quality of rationality in human nature, or of a mechanical expression of social logic,[28] and it is thought that the chief function of historical investigation is to demonstrate and amplify the deductive or ideal process.

4. It remains to speak of the *evaluation* of legal institutions by *reason*. The processes of criticism and explanation are very similar. Because of the different and often conflicting philosophical attachments which have grown up as the problems of society are considered from one angle or the other, and because the method of explanation, as we have found it convenient to pursue this discussion, relates concrete reality with a large outline of life — with the oscillations of centuries from the point of view of external nature, or with a governing principle in the sphere of reason, — the method of criticism according to reason is given a separate place.

This method differs chiefly from the rationalistic method of explanation in that it descends to details. It passes from the domain of ideas and abstractions

[26] See, for the applications of natural law based on "common sense" in the creation of extra-constitutional limitations, protection of vested rights, liberty of contract, etc., *Haines*, "The Law of Nature in State and Federal Judicial Decisions," 25 Yale Law Jour. 617–657.

[27] *Hegel*, "Grundlinien der Philosophie des Rechts," pp. 18 seq.; "Phänomenologie des Geistes." Cf. from another camp in legal philosophy, *del Vecchio*, "Formal Bases of Law," p. 326: "we should look upon history, in its organic character, as the unfolding of an implied purpose. In this sense, the series of particular positive laws appear to us as unified by the tendency toward the development of natural law. This tendency grasped by the mind a priori as an absolute and universal necessity, superior and anterior to any application in experience, develops in it through a long and laborious historical gestation."

[28] *Tarde*, "Les Transformations du droit," cap. vii, 7th ed., Paris, 1912.

to a world of concrete things. It is not sufficient for the purpose that legal phenomena be encompassed under a bloodless concept, but they must be practically weighed and measured and rated according to their worth. But the process of transition is full of pain and perils. In passing from the sphere of idea to the world of actual things an abridged and unfathomable gulf must be entered. The journey may mean forgetfulness, and emergence new birth. Therefore, the attempt to evaluate legal notions and practices by the aid of reason alone, is likely to become a subjective method which may claim a far-removed philosophical ancestry, but which has lost its metaphysical documents of title.[29]

There are two leading logical varieties in modern times of the rationalistic method, reducible again to many subdivisions. The first is the eighteenth century type of natural law distinguished from other types by the effort to discover fixed concrete rule of law superior to positive law.[30] The second variety is one which has an important and arguable philosophical basis that has been made familiar by the phrase "law with a variable content."[31] However, the topic of

[29] As, for example, *Boistel*, "Cours de droit naturel," Paris, 1870, pp. 28 seq., who allies himself with *Rosmini*, and with general ideas which go back to *Plato*. Cf. *Gény*, "Science et technique en droit privé positif," seconde partie, Paris, 1915, pp. 280 seq. See also, *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," i, p. 35.

[30] Based usually on a deductive principle gratuitously or fancifully derived, as is the case even with *Boistel*, who starts from "the inviolability of human personality." We must here record our failure to understand why the life principle extending even to crystals has not been recognized instead of drawing the limits about human beings, many of whom, in the lower stages at least, are hardly superior as social types to anthropoids.

[31] *M. R. Cohen*, "Jus Naturale Redivivum," 25 Philosophical Review 761; *Stammler*, "Die Lehre von dem Richtigen Rechte," Berlin, 1902, pp. 137 seq. (Vol. viii in this series.)

According to *del Vecchio* the concept of law does not involve a material content, since that would destroy the apodictic validity of the principle

natural law is one of such amplitude, and, also, one made so familiar in all literatures[32] that our present purpose is satisfied in noting this intellectual phenomenon in its proper order in this discussion, without any effort further to indicate its influence.

Summing up, the attitude of the whole period antedating the rise of historical studies was, in general, to regard all phenomena of social life as governed in their existence or their worth by laws readily discoverable in the bosom of external nature, or in the depths of the human mind. Exact information was entirely lacking touching either the causes or effects upon social life of legal phenomena. The facts were assumed, and generalizations were freely erected on these insecure pedestals.[33] Theories of law, of sovereignty, and of society contested with rival theories. States were overthrown, constitutions were born, and economic, legal, and political creeds blossomed, and bore their fruits in this cavernous soil.

So far as there is implied in these statements a misguided or disguised motivation, there was not, however, anything unreal in this process of social upheaval. The clash of armies, the rise and fall of oligarchies and tyrants, the flux and reflux of commerce, and the changing periods of economic dominance and dependence were very real facts. While the larger political and

of law which involves only "the form of the idea of law, or that which necessarily appears in every juridical phenomenon." Law is, therefore, defined as "the objective coördination of possible acts among men according to an ethical principle * * * "—"Formal Bases of Law," pp. 217 seq.

[32] See, especially, *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," i, Leipzig, 1902, pp. 12 seq. 331 seq. (for England and America); *Ritchie*, "Natural Rights," 2d ed., London, 1903; *Pulszky*, "Theory of Law and Civil Society," London, 1888.

[33] Cf. *Comte (Charles)*, "Traité de la législation," vol. i, p. 330. *Buckle* shows this in detail: "History of Civilization in England," vol. i, pt. ii, cap. xiii.

economic movements of the world have invariably required, and been supported by programs, in which the event has always disclosed that the results attained have been miscalculated,[34] the illusion of purpose[35] when translated into fact became as tough a datum of experience as if fortified by an unassailable metaphysic.

The rise of historical studies initiated a new method of thought. The purely deductive process which without experience was thought sufficient to account for the facts of social life, and which, likewise, assumed to be able to establish standards of value without investigating these facts, was replaced by the inductive procedure of history. This movement was all-embracing in scope; it affected not simply the social sciences but pervaded the whole domain of knowledge. Within the Historical School itself, the metaphysical element which inevitably enters every movement of large proportions to give it that rationalistic basis which seems to be demanded by the human mind, soon attempted to rise from the data of Roman law to a world-view of legal institutions, in a manner, as has often been pointed out,[36] which resembled the deductive method of natural law.

The historical movement was quickly succeeded by positivism, on one hand, and evolutionary pantheism on the other. With the survival of an historically renovated form of Kantianism there was reached the stage

[34] A sentence of *Kohler's* is in point: "the ambition of a half-barbarous Macedonian demolished the Persian empire, and a flood of Oriental culture poured out over the Occident." — "Die Entwicklung im Recht," xiv *Grünhuts Z.* 410 seq.

[35] The inherent difficulty of forecasting, or even of explaining in social relations, the effect of conscious attempts to alter the course of human action is intensified if no effort is made to employ the various available sources of knowledge which deal with social facts; and "whatever social laws we may be able to discover will always be marked by a character of contingency much greater than in the case of other scientific laws." — *Tanon*, "L'Évolution du droit," p. 65.

[36] Cf. *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," i, pp. 480 seq.

represented at this moment in the field of legal philosophy, by two forms of realistic idealism — Neo-Hegelian and Neo-Kantian — and the various other types of idealism and realism.

So far as concerns legislative method there appears to be entire unanimity among all legal philosophers on the acceptance of experience. Differences will be encountered only in matters of detail on the procedure, and in the interpretation, of the results of experience. This fact is one of very great importance for the future of social institutions, and it may be expected when the profession of law arises to a "Weltanschauung," that the law itself, aided by the suggestion of new social ideas, will commence a development comparable to the progress seen on every hand in the domain of the natural sciences.

The possibilities of human endeavor if not boundless have not been bounded, and the future holds not only the hope, but the reasonable promise of the greatest expansion of man's material culture, development of human power over the forces of nature, unfoldment of new wants and activities, abolition of all metaphysical restraints on freedom of thought and action, progressive diminution of poverty and disease, and at last, attainment of a stage where material necessity has been effectually conquered and freedom actualized in its highest form.

So much, at least, is conceivable without enlarging the horizon of the factors of knowledge. From the standpoint of society as we now know it, this program it must be acknowledged has an utopian quality; but yet it cannot be denied that the first steps have already been taken and that something of the kind indicated is the hope and wish of the average social philosopher. The fact also must be admitted that the process of realization must be one of centuries, of many centuries perhaps, if it is not even arrested by a social or natural

cataclysm. Our interpretations of life will differ, and there will remain contests as to what is desirable, on one hand, or feasible on the other, which cannot be arbitrated; but there is still a large field of problems where substantial unanimity is attainable.

In attaining whatever may be thought to be the ideal form of society, it cannot be too often emphasized that there are certain rigid limitations existing in the nature of society itself upon the efficacy of law. We cannot legislate at will an ideal condition. The law is a dead letter unless "it works"; and it will not work unless and until it is adjusted to the material and psychic conditions of the society in which it is to operate.[37] It is a truly remarkable situation that with the greatest development of legal learning there is the scantiest knowledge of the actual operation of legal rules. Lawyers, lawmakers, and law teachers are occupied with the conceptual problems produced in great abundance by the creation of legal rules, but, strangely enough, they do not know how these rules are being realized, if at all, in actual life.[38]

II. It may be useful to indicate briefly some of the legislative problems as to which it is essential for the lawmaker to take a definite position.

First, what of the equilibration of interests of which much is said in the first division of this book? Why should interests be balanced at all? Why should not

[37] It is one of the most important constructive proposals made by *Pound*, to investigate "the means of making legal rules effective." — "Scope and Purpose of Sociological Jurisprudence." 25 Harvard L. Rev. 514.

[38] *Ehrlich* has been one of the foremost Continental writers to insist upon the importance of this knowledge of the actual social operation of law. See his "Grundlegung der Soziologie des Rechts," Leipzig, 1913; *Manigk*, "Erforschung des lebenden Rechts," xxx Oest. Zentralblatt 709. A valuable reference list is entered in *Cosentini*, "La riforma della legislazione civile" (1911), p. 285.

the legislator (or the judge when creating a new rule of law) resolutely choose the better or the best among conflicting interests? Again, what is the better or the best, and what is the standard?

On the first question, Berolzheimer, speaking for himself, if not for his school, advocates conscious choice, where choice is possible, and points out that the course of legal evolution has not been a process of tight-rope walking, and that interests in conflict have not balanced, but that one has annihilated the other. This point of view recalls again what in this period of turmoil, which has overtaken nearly every quarter of the globe, is a dominant thought. Are struggle and force and conquest with all that they imply of cruelty and bloodshed a necessary foundation of human progress, and a rule of life? And what shall be the attitude of the legislator on these questions in the various ways that they touch the legal establishment?[39]

What position is to be taken with reference to mediate and final ends? This question is usually of importance also in legislative technic where the prevailing practice tends to very restricted purposes. Undoubtedly this is as far as expediency can go, but this admission develops another fact of great importance — that the limited object sought, frequently is either missed or surpassed in a heterogeneity of ends. The question then arises, whether the legislator should not chart his course more remotely in practice. Such a solution, however, again involves other important consequences. The path of discretion becomes automatically broader. The result is agreeable to the tendencies of "freie Rechtsfindung," but is destructive of that fixation of concrete legal rules which is widely thought to be desirable in modern law.

[39] Cf. *Jhering*, "The Struggle for Law" (Lalor's tr.), 2d ed., Chicago, 1915; but see, *Nasmyth*, "Social Progress and the Darwinian Theory," N. Y., 1916.

A related question is the qualitative and quantitative relation which law should bear to social evolution. History has furnished its own solution. Law is the laggard behind custom. One of the chief purposes of the Sociological School of thought rests on this fact; and as we understand the proposal, it is contended that law should keep abreast of the march of social progress.[40] It is clear that a quality of flexibility in legal rules which will permit their adjustment to changing conditions would raise difficulties especially with the certainty thought to be desirable in legal standards; and, also, there are spheres of law where uncertainty would be destructive of the chief purpose of any rule whatsoever. This appears most clearly in the field of commercial law, where the certainty of the rule is more important, in many respects, than the force of compulsion behind it. If the law is to be made adjustable to the facts of social and economic evolution, the principle of certainty must still be retained in those departments where it is more essential, for the larger purposes of the law, than justice in individual cases. At any rate, the distinction is one which the legislator must at least have in mind, however it may be disposed of.

What solution is to be attempted of the competing claims among individual, class, social, and State interests? Shall private interests when in conflict with social interests always give way, and if so why? It is true that an affirmative answer is dogmatically given especially by thinkers of the sociological group, but something more than a dogmatic answer is necessary to eliminate the problem. What limitations shall be drawn on the dominance of State interests, and why?

[40] One leading thinker, of the neo-Hegelian School, has even claimed for law the superior mission of leading the way. — *Kohler*, "Philosophy of Law" (*Albrecht's tr.*), pp. 58 *seq.*

What is the proper scope of law in modern society? What influence, if any, do changing economic conditions have in the consideration of the question? The centralization and expansion of industrialism within recent years have brought a pronounced change in the scope of law. Liability now extends beyond the concept of fault and is now objectified and de-personalized as one of the ordinary risks of business. The State does not any longer permit an employer to assume all risks of negligence, but requires positive measures which reduce the probability of risks of injuries. The sphere of formal liberty has been reduced in a variety of directions to a kind of status.[41] Regulations of building, sanitation, and (for public employees) of deportment, of the personal use of narcotics, of hours of labor, of methods of competition, and of other matters in a laissez faire régime within the province of liberty, have been recast on the models of the most ancient codes. Price and trade regulation has returned to the pattern of the Middle Ages. Not only has the sphere of formal liberty — what in loose language one has a "right" to do — been abridged, but an entirely new concept has been introduced by modern legislation in the "right to work," a claim of the individual against the State itself. Enough has been said to show that the scope of law is not stationary any more than the rules of law.

Should legislation be intrusted to experts, in analogy to the learned judiciary? In other words, should the process of legislating be made esoteric as is the case with Anglo-American case-law, or should it continue to be democratic, and, in the scientific sense, ineffective? Here, again the solution is not so apparent that he who runs may read.

[41] Cf. Sir *Frederick Pollock's* note (L) to *Maine's* "Ancient Law"; *Dicey*, "Law and Public Opinion," p. 283; *Pound*, "A Feudal Principle in Modern Law," 25 Int. J. Eth. 22.

Such are a few of the larger problems of legislative policy; and the mere statement of them, without any attempt at solution, is enough to indicate the important sociological, historical, and philosophical soundings which must be made before satisfactory answers may be ventured.

III. This leads to a statement in a very summary way, also, of some of the present defects of legislative method.

First, it is assumed that any normal adult is competent to legislate. The human composition of our State legislatures in average intelligence is a clamoring witness of this childlike belief; but, so far as we may intrude our views in a discussion not intended from a controversial point of view, we would regard it as fallacious to think that a legislature of academicians would work out any better practical results in the present state of legislative science. There is yet a golden mean.

Another capital defect is the preponderance of subjectivism. The legislator takes for his standard of human conduct his own limited impressions of the nature of the world and seeks to thrust upon an incorrigible flux of social evolution his own subjective views, instead of taking the world itself as the standard. This error is in part neutralized by the inertia of the assembly; and the further correction comes, at last, in the actual play of legal phenomena. Then, and then only, is the objective standard realized.

The next defect is that of ideality. This has always been one of the most conspicuous shortcomings of legislative policy. The possible is commonly disregarded for the desirable,[42] or, more accurately, what is

[42] "Il ne suffit pas qu'une réforme soit desirée; il faut qu'elle soit possible, et qu'on emploie des moyens propres à la réaliser." — *Tanon*, "L'Évolution du droit," Paris, 1911, p. 199; see, also, *Vaccaro*, "Les Bases sociologiques du droit et de l'État," Paris, 1898, p. 456.

subjectively found desirable. An exaggerated belief in the efficacy of legislation assumes perfect receptivity of the governed to every sort of legislative mandate. What requires to be urged against this mistaken optimism is that human nature must be taken as it is, with all its harshness, wilfulness, egoism, and unreason — in short, with all its physiological and psychological wants and tendencies. There is a relation between the efficacy of legislation and human wants. What is not assimilated within the life of a people cannot have the force of law. Law, therefore, is a kind of organic growth[43] which may be affected by harmonious or inharmonious elements. The harmonious elements are readily assimilated and accord with the nature of the organism; the inharmonious elements are either cast out, remain inactive, or produce a pathological condition temporarily, and, in some cases, permanently, obstructing the normal development of social growth.[44]

A last defect in legislative method which is in part the product of other defects, is superficiality. Anyone who has attempted to analyze or discover the plan of reasoning disclosed or undisclosed of a group, large or small, attempting to deal with a normative problem, cannot fail to be struck by the vagueness, shallowness, and incongruity which usually dominates the argument. The diversity of views which are urged, each highly complex in itself, and the extent to which

[43] In this lies, as it would seem, the real strength of the doctrine of the Historical School, and again from another point of outlook of the school of *Krause*, ("System der Rechtsphilosophie," Leipzig, 1874, pp. 431 seq.). See the published presidential address of Elihu Root before the American Bar Association, Aug. 30, 1916: "No statute can ever long impose a law upon [the people] which they do not assimilate," 2 Am. Bar Assn. Journal 751.

[44] Perhaps the writer should here reassert that the use of language borrowed from physiology or biology has no other than a metaphorical meaning. The phenomena of society are sui generis, but the lack of well understood scientific terminology invites analogies in other fields.

emotional bias enters, often make it difficult to look upon the resolutions of many minds, acting in the same dialectic, as products of reason in any proper sense, but rather as intuitional, or, perhaps, unwilled, phenomena brought into being under the illusion of consciously selected issues of the mind.

IV. The foregoing discussion brings us to a consideration of the method and materials available to the legislator, and necessary to be employed to escape the criticism above raised.

They are as follows:

1. The systematic or expository method must be carried out to a point of practical completion. That is to say, exact data must be gathered, (*a*) concerning the situation upon which legislation is to operate; (*b*) concerning the most effective measure to be applied; (*c*) and the effect upon the particular situation,[45] and the reaction upon other social habits by the enforcement of the measure selected.[46]

In this direction, the legislator may find a working model in the methods of boards of directors of successful corporations. The existence now in a number of states of legislative reference bureaus is responsive to the thought which is coming to be recognized that intelligent action and judgment, even in matters of legislation, demands a satisfactory foundation of statistical

[45] Prof. *Edward A. Ross* ("The Principle of Anticipation," xxi Am. J. Soc. 577) has pointed out that the distinction taken in legislation has been between near and remote consequences by way of an analogy borrowed from physiology. He argues that any established policy which affects persons favorably or unfavorably will be anticipated and will modify behavior; and that the social scientist and legislator must anticipate the anticipations.

[46] Failure to take account of this reaction is shown in the actual social operation of the marriage evasion act in Illinois. See Bulletin of Chicago Legal Society, 1916, no. 2, in xi Illinois Law Review, (October, 1916).

information. The possibilities of the systematic method are of the greatest importance, and it is not unlikely, when it is fully developed, and becomes a regular instrument of legislative action, that legislation will cease to be an inferior legal product, but will take rank equal, if not superior, to judicial precedent. That the present method is inefficient and unscientific will hardly be denied, and that the legislative function must be raised to a higher plane of dignity, a dignity comparable to that of the courts, in order that it may satisfy its theoretical object, is obvious. It would, however, be a mistake to assume that an improvement in the human factor upon which legislation depends would of itself suffice. If the method itself does not improve, the good character of the lawmaker will not succeed in raising legislation from its present unscientific level.[47]

However, the statistical method while indispensable is not self-sufficient, in the narrow sense in which the term "statistics" is here used, to furnish a scientific basis for legislation.

2. The historical and comparative methods are necessary to round out and humanize the results of statistical inquiry. This implies a broader kind of statistics based on legal history, comparative law, and legal ethnology. The rigor or extent of this program does not in any wise detract from its scientific necessity; nor is the task involved in this demand so exacting as to be unworkable.

The facts of human life are not detached points in space, but are expressions of a unified process the spirit of which penetrates the realm of history, giving it that rationality frequently discernible only after long periods

[47] Cf. *J. H. McFarland*, "Why Congress is Slow," Outlook, vol. 113, no. 9, p. 456.

of time, and that configuration which makes it possible to apprehend it as a thing of substance and continuity.[48] A mere accumulation of detached particulars does not constitute a history.

The special value of comparative law lies in its power of suggestion, and in its capacity to afford vicarious experience.

Legal ethnology has the function of making possible restorations of the missing pages of history especially in the earlier periods; and it is also a powerful auxiliary for understanding the ethnic soul, and for affording reliable criteria, under simpler conditions of life, of the efficacy of legislation in precisely those fields where there is not available the required statistical information.

It is conceded here that under scientific observation, experiment is a method better than any of those discussed. This has been the favorite resort of Anglo-America[49]; but experiment has not, it is believed, been adopted as a method under the condition of scientific observation, and the results of legislative effort have been allowed to lapse into history. We have made experiments; but we have not profited by them. We have no means of knowing what we have experienced as a social fact. Experimentation of this kind is just as worthless in the field of legislation as it would be in chemistry or physics. Again, mankind does not possess such reserves of spiritual force that it can afford to squander its energies in attaining at a loss what can be acquired with profit.

[48] Cf. *Spencer*, "The Sins of Legislators," Contemporary Review, May, 1884: reprint in "Man versus the State" Williams and Norgate, London, 1907; Am. ed. (Truxtun Beale, editor), N. Y., 1916: Comment by Prof. Harlan F. Stone, p. 237.

[49] See General Introduction to this Series.

3. The last method necessary for scientific law-making is the philosophical.[50] Demonstration of this claim to the utilitarian is a matter of some difficulty. The question is immediately raised in the language of one of Tchekov's characters, "What's philosophy got to do with it?" It may at once be answered. Philosophy is necessary for any valuation of empirical data. We may have collected with great diligence a great abundance of facts, but until these facts are fundamentally evaluated, they are grains of sand having the quality of bulk, but lacking, nevertheless, the quality of cohesion.

This may be demonstrated.

A proposal for legislation is made. Let the question be raised, "What do you expect to accomplish by it?" Assume that an answer is given. Now, let the question be asked, "Why?" and let the same interrogation be repeated until the subject is exhausted; and it will be discovered that the proposal is based on a philosophy of some sort — it may be very superficial, and hardly in an accurate sense worthy to be dignified by the term — yet, it is a philosophy, or, at least, a tender of one. It will be the ultimate reason or explanation in terms which must involve, not the individual or individuals standing alone, the group, the class, or the State, but the whole of reality.

It may be objected that the interpretation may be erroneous. That possibility, nay, even the probability, is admitted. It may further be objected that there be at the same moment a variety of conflicting

[50] Extreme statements such as that of *Alvarez* (p. 461 infra) "that philosophy of law has become synonymous with what is impossible and absurd," greatly overshoot the mark, and fail to be serviceable in marking the limits of caution and scope which should attend the use of metaphysical ideas. One even suspects that the learned author (*Alvarez*) has identified all philosophy of law with one kind of natural law.

interpretations. That also is admitted. But, after all, there is a right interpretation, even though the human mind does not discover it, and even though we disagree in our efforts. And, in the meanwhile, though man doubts and hesitates, and holds tenaciously to the assertion of his primary wants, thinking and acting as his clan thinks and acts, the world is furnishing an interpretation of its own which is overlooked because we are a part of it.

A. K.

INTRODUCTION

By H. N. Sheldon[1]

An essential element of such a series as this, consisting of master-works on jurisprudence and the philosophy of law, is a consideration of Legal Method, the mode of treatment of the concrete legal problems which are presented in practice, the manner in which the abstract legal principles that lie at the foundation of all jurisprudence are applied to the task of reaching just and reasonable conclusions adequate for the decision of all disputed matters. The present book deals with this question of Legal Method, treating it mainly from the standpoint of Continental jurists, such as Professors François Gény, Eugen Ehrlich, Geza Kiss, Josef Kohler, Heinrich Gerland, of different European universities, Justice Gmelin of the Stuttgart Court of Appeals, and Fritz Berolzheimer, the president of the International Society of Legal and Economical Philosophy of Berlin. Another noteworthy chapter, on Courts and Legislation, by Professor Pound, the Dean of the Harvard Law School, will attract special attention from the general reader, and that attention will be well rewarded. It is a study of the nature of law and of its creation and development by judicial decision and by legislation, treated both in the light of the past and in its application to the needs of the future, — a development and application advantageously to be made, as Professor Pound concludes, by the empirical method of our Anglo-American law, assisted by proper legislation.

[1] Former Justice of the Supreme Judicial Court of Massachusetts.

It was said by Lord Campbell, in his "Lives of the Lord Chancellors," that "English lawyers, though very acute practitioners, have been rather deficient in the enlarged knowledge of jurisprudence; and that has been true also of the members of the American bar." This doubtless was due in large measure to the somewhat haphazard method of legal instruction which had prevailed in both countries, by which the scientific element in the law was almost wholly overlooked. As has been pointed out by Professor Redlich of the University of Vienna, in his recent report to the Carnegie Foundation, one result of the systematic instruction now given in most of our law schools has been to bring about scientific treatment of the law, which may be expected to cause, among scholars at any rate, increased regard for the element of science in the law and a real study of comparative jurisprudence. It may be hoped that this tendency will be increased when to what is called the case system of instruction shall be added a general indoctrination of students into a view of the law as one whole body, which, though composed of several departments, has yet an organic unity of its own. Such a spirit among students will not be contented until it shall have utilized the researches of European scholars in the field of law regarded both as an art and as a science. One of the objects of the present series is to contribute to the attainment of that end; and this volume, necessarily somewhat disconnected from being made up of the works of different scholars, has an important place in the series.

Those who have studied exclusively the Common Law are accustomed to regard the cumulative effect of judicial decisions as being, with the additions and alterations made by statutes, the great guide to be followed in the practical administration of justice, as affording

the best means of reaching proper conclusions in the concrete cases that have to be decided between party and party. The following of precedents in matters which have been decided, the correct deduction from those decisions of the underlying principles upon which they have been rested, and the application of those principles to new questions, so that old and new decisions may by a process of natural development grow into a continually extending body of law, sufficient for the guidance of all members of the community, have been regarded as the safe method of judicial decision. No case, it is considered, stands by itself; no case is to be decided merely by a determination of what in the peculiar circumstances presented may be required by abstract justice, as the conception of abstract justice presents itself to the unlimited discretion of the court. On the contrary, each new question is to be passed upon in the light of rules already laid down, and in its turn is to provide both new rules and new modes for the application of old rules to the settlement of new questions; and English and American lawyers have been wont to believe that Continental jurists on the other hand, so far as they are not aided and governed by the positive provisions of a code or other statute, are taught to disregard precedents, to recognize no binding force in earlier decisions, but to endeavor in each case to do justice between litigants by determining, justly and in accordance with what Professor Gény calls the "personal inspiration" of the judge, all the controverted questions that may come before him.

It is true that in the Common Law not only do statutes play an important part in altering or abrogating rules and doctrines established by decisions, but the development and increasing intelligence of the people, their changes of opinion on matters of political science or of

public or private morals, and even considerations of expediency, do affect powerfully, though slowly, the views of the judges, and do materially alter and sometimes reverse the rules and doctrines affirmed by former decisions. So, too, upon the Continent of Europe, as is pointed out by Justice Gmelin and by other authors in the present book, it is the function of the judge, subject to the limitations both of statute and of custom, "to contribute," as Professor Gény says, "to the creation of law and to develop further such law as has already been formulated." It results, if these contentions are maintained, that fundamently there seems to be not so wide a difference either in the object aimed at or (outside of certain rules of evidence or procedure not in themselves very material) in the method adopted for reaching that object between our own courts and those of Continental Europe. Accordingly we should find in these pages much that will be of practical value to ourselves and our courts, as well as much that concerns chiefly the science of jurisprudence and the philosophy of law.

Our authors, recognizing that within the region left to the judge outside of the bounds of statute or of custom, he must exercise his personal activity to perform the function which has been stated, have much to say about "the nature of that activity as regards the subject-matter to which it extends, the precise manner in which it works, and the foundations upon which it is based." The distinction between the two systems of law is brought out in the first of these points. According to Professor Gény and those who agree with him, the judge, when the formal sources are insufficient to prescribe his decision, should act according to the dictates of real justice, on the rule which a legislator would prescribe for just the circumstances of that particular

case, abstaining carefully from laying down any abstract rule, but passing simply upon the concrete problem presented. The common law judge, on the other hand, (and some of the Continental jurists agree with this) though equally careful to consider all the particular circumstances involved, seeks in the light of the principles which have been laid down in other cases to determine those which should govern the case before him. It is for this reason that under the latter system the decision has the force of a precedent which is denied to it under the former system, although as to that matter the discussion of Professor Ehrlich in the second chapter on "Lawyers' Law" and the "jus quod est" should not be overlooked. It is both interesting and instructive to follow the keen and logical discussion of the question in many of the chapters of this book.

Under both systems the object aimed at is to adapt the rules of law to the needs of social life. As was to be expected, the authors whose work is here presented do not exactly agree just how this is to be done. But their discussion goes deeper than many of us have been accustomed to look. They are not content with saying that judicial decisions ought to depend upon the application of correct principles of law to ascertained facts; their effort is to show how, in cases not governed by rules already established, the correct principles of law are to be determined and so applied as to produce a just result. The fact that we who follow and administer the Common Law resort in such cases to reasoning from principles that have been laid down in previous decisions ought not to prejudice us against the different method advocated in some parts of this book of aiming directly at the ideals of justice and of general utility. It is to be regretted that the omissions which necessarily have been made from some of the

discussions have deprived us of a part of the context. What is presented, however, is ample to arouse interest, and it well may be hoped that many readers will be led to examine the subject further.

We need not here consider how far the actual results reached by these methods of ascertaining and applying principles of law to new cases not absolutely governed by those principles will finally differ from each other. The object of all law must be not only to secure real justice to the community, but no less to make it certain that each individual shall be able to know in advance of judicial decision what are his rights and his obligations, so that he may regulate his conduct aright. In the long run, that system or union of systems which best attains these results will be adopted. In the meantime we cannot overestimate the importance of studying carefully every system for which preëminence may be claimed. It is believed that this book will be of material assistance in such a study, and all the more so from the different contentions made by the different authors from whose works it has been derived.

INTRODUCTION

By John W. Salmond[1]

A large portion of the present volume is devoted to the discussion by divers authors of the question of what is termed "free judicial decision" or "freie Rechtsfindung," — namely, the deliverance of the administration of justice from undue submission to minute and rigid rules of law and the corresponding extension of the sphere of unrestricted judicial discretion. The question is one which has received but scant attention in English or American legal literature, but it is clear from the contents of this volume that it has been the subject of much consideration from European jurists and that it is one of grave practical importance in respect of all schemes of legal or judicial reform.

Law has been defined by many men in many different ways, and the diversity is largely due to the fact that a system of law is a complex phenomenon possessing different aspects from different points of view. From the point of view of the lawyer, however, whether he is concerned with practice or with theory, the law presents itself primarily and essentially as a system of rigid rules in accordance with which justice is administered in the tribunals of the State to the exclusion of the unrestricted judicial discretion of the judges and magistrates to whom this function is intrusted.

Theoretically the administration of justice is possible without the existence of a system of law at all. Courts of justice might in theory be left to do justice according

[1] Solicitor-General for New Zealand.

to their own good pleasure, determining the right of each individual case according to the facts of that case and according to the untrammeled sense of natural equity. Certain courts of inferior jurisdiction do in fact possess by statute this power of adjudication in accordance with equity and good conscience without reference to rigid rules of law. A similar jurisdiction was in earlier days exercised by courts of equity. Nevertheless the general adoption of such a system of courts of justice which are not also courts of law is open to objections so grave that at all times and in all places it has been found necessary to limit or exclude judicial discretion by elaborate systems of fixed principles of law which courts are bound to follow in the exercise of their judicial functions. These rules have been either imposed upon the courts "ab extra" by the State in the form of statute law, or have been developed by the courts themselves in the form of judicial precedents which exclude for the future that freedom of judicial decision in which they had their origin. It is true that this system of administering justice according to law — legal justice instead of natural justice — has brought grave evils in its train. It is the source of the technicality and formalism, the complexity and esoteric mystery, which have at all times been made a ground of reproach against judicial administration. Nevertheless the good sense of all communities has at all times recognized that in spite of these grave evils the balance of advantage lies beyond question on the side of administering justice in obedience to a rigid and elaborate system of binding legal rules.

Although there is no question, therefore, that in all civilized and advanced communities it is practically necessary that justice should be administered according to law and not according to the sense of equity and good conscience of its judicial administrators, there still

remains the very important and practical question as to how much law is necessary: that is to say, as to the extent to which the exclusion of free judicial discretion by fixed predetermined principles of law is necessary and justifiable. How far should a legal system consist of a comparatively small number of general principles which, because of their generality, are necessarily flexible and leave scope for a large measure of judicial liberty in their administration; and how far, on the other hand, should a legal system seek by the multitude, minuteness, and fixity of its constituent rules to exclude so far as possible the liberty of judges and magistrates to do as they think just in the individual case?

There can be little doubt that English law and the systems derived from it have followed the latter of these courses to an extreme. In complexity, in minuteness, and in rigidity, these systems have in many departments of the law gone far beyond the ideal limits. This overgrowth of law is indeed scarcely avoidable in any system which grows by the internal secretion of case-law instead of by the external imposition of statute law. Statute law is almost necessarily more general, more free from minute and even irrational distinctions, qualifications, and exceptions, than the law which is developed piecemeal from precedents established by reference to the individual instance. If English law is ever codified, the most striking difference between the law in its new statutory form and the unwritten law of the present day will be an enormous reduction in its bulk and complexity and the wholesale elimination of the minute distinctions and exceptions by which it is now disfigured.

The case in favor of an elaborate and rigid legal system is far stronger in respect of substantive law than in respect of procedure. In modern times we have begun to recognize the extent to which, in all matters which

relate to procedure, judicial discretion may wisely be left free from the trammels of law. Yet we have a long way to travel on this road before an ideal system is within our sight. In earlier days the diseased growth of procedural law was the chief reproach of the English system. The technicality and formalism of the older law of pleading and practice have indeed ceased to a large extent to deform and discredit the administration of justice, and will rightly be regarded by the future historians of the law as one of the most remarkable features of the dark ages of legal development. The elimination of legally essential but practically immaterial forms, the substitution of merely directory for mandatory rules, the establishment of wide powers of amendment, and other reforms, have largely restored to the courts the power of doing in matters of mere procedure such justice as seems good to them. Yet we are still far from being beyond reproach in this matter. It is difficult, for example, to view the complexities and technicalities of the modern law of evidence as having any rational justification or any place in a reasoned system of judicial administration. Surely if a court of justice is fit to be intrusted with the function of determining issues of fact, it is also fit to be trusted to hear and consider such evidence as in its unrestrained discretion it considers relevant to those issues. A system of rules of law for the admission or exclusion of evidence would surely in a rational system of judicial administration go its way to the same limbo to which the technicalities of the law of pleading have been already well committed. There is no other form of human inquiry in which the inquirer is not at liberty to seek guidance from any source which seems good and sufficient to him.

Why then should the inquiries of courts of justice be conducted on any different principle? In many modern

statutes creating new jurisdictions it is expressly provided that evidence may be admitted whether admissible in accordance with the law of evidence in other proceedings or not.

There seems no reason to believe that this elimination of the law of evidence in favor of free judicial decision has brought any evils in its train, and it may be hoped that the progress of legal reform will eventually make this elimination general. The reasonable precaution against irrelevance and prolixity in trials is the judicial discretion of the court in excluding evidence which, in the opinion of the court, in the particular case is needless or has no bearing on the issue, and not the application of fixed predetermined rules of admission or exclusion. That hearsay is not evidence, that is to say has no evidential value, is, notwithstanding all the legal qualifications of it, notoriously untrue as a proposition of fact. Why then should it receive the authority of a rule of law? Let the court in its discretion exclude hearsay when it is in fact destitute of evidential value or where there is no sufficient reason why primary evidence should not be produced, or where its admission is otherwise unjustifiable or inexpedient; but in the very numerous cases in which such evidence is in fact and in justice unexceptionable, why should it be excluded by a rule of law?

In the case of substantive law on the other hand — law which determines rights and liabilities themselves and not merely the machinery of their judicial ascertainment and enforcement — very different considerations are applicable. Here the case in favor of the administration of justice in accordance with a complex body of rigid rules of law is well established. Here, if we are wise, we shall have as little "freie Rechtsfindung" as possible. It is true indeed that even in this sphere the evils which accompany an elaborate and technical legal

system are many and serious, but they are the necessary price which a community pays for release from greater evils. It is true that the administration of justice according to law is notoriously uncertain. Yet the extensive substitution of unrestricted judicial discretion for preëstablished rules of law would add to this uncertainty rather than diminish it. It is true that the law is not always wise or just; but in the long run, as representing the formulated wisdom and justice of the community, it will be found wiser and juster than the individuals who administer it. The ancient maxim that it is not permitted to be wiser than the laws is applicable, not merely to those whose business it is to obey them, but also to those who are intrusted with their administration. It is true that the law necessarily lays down general rules which cannot take due account of the special circumstances of the individual case, whereas a court which is permitted to do justice at its good pleasure can take all these circumstances into consideration and act accordingly, observing that equity which, according to the old definition, mitigates the rigor of the law. Yet it is certain that this advantage is bought at too great a price. The same principle which allows a judge to take account of the individual merits of the particular case exposes him at the same time to all the perverting impulses of his emotional nature, to all his prejudices, and to the unconscious bias of his mental constitution. For one case in which, in any reasonable system of law, a court was constrained to do injustice because of necessary conformity to preëstablished rules, there would be many in which, unguided by such rules, he would be led astray by the temptations which beset the "arbitrium judicis."

A characteristic feature of modern criminal law is the substitution of judicial discretion in the measure of

punishment (restrained only by a fixed legal maximum) for the earlier device of fixed penalties. I am far from being assured that the change is altogether one for the better. There is much to be said for the establishment of minimum as well as for maximum penalties, in order thereby to withdraw the courts from the influence of a sentimental humanitarianism which in the guise of mercy to the individual too often does grave mischief to the community at large.

One of the chief advantages derived from the maintenance of a body of fixed legal rules which are not subject to the "arbitrium" of its administration is that on this basis rests the prestige and power of the administration of justice. The law is impartial. It has no respect of persons. Just or unjust, wise or foolish, it is the same for all, and for this reason men readily submit to its arbitrament. In the application and enforcement of a fixed and predetermined rule, alike for all and not made for or regarding his own case alone, a man will willingly acquiesce. But to the "ipse dixit" of a court, however just or impartial, men are not so constituted as to afford the same ready obedience and respect. The "arbitrium judicis" depends for its prestige upon the reputation and personality of the court itself. The rule of law, however imperfect, has behind it the sanction of the organized commonwealth. Though the rule of law may work injustice in the individual case, it is nevertheless recognized that it was not made for the individual case and that it is alike for all. "Durum sed ita scriptum est" is allowed as a sufficient justification for its imperfect operation in the individual instance. The law-abiding spirit so created in a community is a public advantage that far outweighs the benefits which may accrue in particular cases by allowing to courts the opportunity of substituting what they conceive to be natural justice

in lieu of justice according to law. An elaborate and technical system of law is doubtless in many respects an evil but it is the only road to freedom from greater evils. "We are in bondage to the law," said Cicero, "in order that we may be free." "Legibus servimus ut liberi esse possimus."

The foregoing considerations are the justification for that progressive development and elaboration of the legal system which is the necessary result of the binding operation of judicial precedents. English law and every other system which has its historical origin in English law grows not merely externally by way of legislative imposition, but also internally by the secretion of new rules which are the product of the judicial interpretation of the law. However skillfully drawn, a statue when first enacted is but an imperfect piece of work. It contains ambiguities, omissions, and real or apparent inconsistencies. But in the process of time it is supplemented by a body, often considerable in extent, of authoritative rules of case-law by which these defects are remedied. In the beginning a statute means what the courts in the exercise of their unrestrained judicial powers decide that it means. In the beginning the meaning of a statute is a question of fact just as is the meaning of any other written document. But in process of time its meaning becomes more and more taken out of the region of fact and becomes more and more determined by authoritative rules of interpretation created by the judicial precedents which arise in the course of its administration.

It is true that this development of case-law has its evil aspects. It is true that the growing burden of it is such as to give some weight to the suggestion that the law should be that which is established by the legislature only, and that in the administration and interpretation of that law the courts should be free to act as they think

fit, without subjection to a vast body of subsidiary law created by the decisions of their predecessors. Nevertheless the system of authoritative judicial precedents is based on sound considerations of public policy.

In the first place it secures the proper administration of justice by imposing upon the courts that restraint which is due to the knowledge that their determination of the individual case is at the same time the establishment of a fixed rule for all other cases of the same kind. The additional sense of responsibility so given to the judicature by the knowledge that they are making law for the future, as well as deciding an individual case, has the same effect in eliminating the influence of illegitimate considerations applicable to the particular instance as is exercised by the existence of a system of preëstablished law.

In the second place the system of precedents prevents the same question from remaining indefinitely open as the subject of repeated litigation and judicial determination. As early as possible it brings every unsettled question within the scope of a fixed legal principle and takes it out of the sphere of free judicial determination. A judge is bound by the decisions of his predecessors, not because they were necessarily or even presumably wiser than he is — not because their decisions are necessarily or presumably more correct than those at which he would himself arrive — but because it is in the public interest that questions once decided should remain decided. Therefore it is, that the law grows steadily in bulk and elaboration by a process of internal secretion, whereby the sphere of the "arbitrium judicis" grows less and less and the sphere of authoritative legal principle grows greater.

The evils of this system of legal development are doubtless great, but they can be largely avoided by the

recognition of two practical principles. The first of these is that no decision is worthy of recognition as a precedent unless it contains within itself some general principle of law as opposed to a mere determination of the individual instance. The second is that, in order to render the system of case-law tolerable, the law so developed should from time to time be formulated as statute law so that its principles may receive authoritative expression "in abstracto" freed from the complexities of the individual decisions from which they proceed. No better system of law can be devised than a system of statute law progressively supplemented by the case-law which arises from its interpretation, and superseded from time to time by a fresh formulation of statute law which incorporates within itself the case-law theretofore developed.

Closely connected with the foregoing question of free judicial decision is the problem of the sound judicial interpretation of the written law — a problem to which a considerable part of the present volume is devoted, and which by reason both of its practical importance and of its scientific interest deserves more consideration than it has received in English legal literature.

The true doctrine of judicial interpretation is a reasonable compromise between two unreasonable extremes, each of which is rendered possible by the inherent imperfections of human speech and the laxity of legislative construction and expression. The one extreme is that of the strictest literal interpretation — the unqualified and rigid acceptance of the maxim, "Ita scriptum est." No language is so perfect, and no legislation so skillful, that this mode of interpretation will not constantly lead to absurdities and defeat the true purpose of the legislature. The opposite extreme is the license of disregarding the letter of the law in order to seek elsewhere a rule that is

deemed more consonant with justice or the legislature's intention. The ambiguities and other defects of language, even when used with the careful precision of statute law, are such that no legislation will bind a court which claims and exercises this license in its methods of interpretation. If the words of the law can be given an unnatural meaning, if words can be read into a statute which are not expressed therein, or disregarded as inoperative although they appear therein, if the courts are at liberty to adopt as law that which the legislature is presumed to have meant rather than that which it has actually said, there are few statutes which would be proof against the dissolving influences of this form of interpretation; and the courts instead of being bound by fixed rules of law made for them would in effect be at liberty to legislate for themselves and to substitute under the guise of interpretation the "arbitrium judicis" for the "lex scripta." Judicial and forensic astuteness could on this system untie all legal bonds imposed by the legislature, and substitute for the administration of justice according to law its administration according to the good pleasure of the courts.

The true and authentic system of interpretation is a compromise between these two extremes. The fundamental maxim of sound interpretation is "ita scriptum est," and it is not the business of the courts to be wiser than the laws and to mold them into conformity with judicial views of what is just or unjust. The letter of the law is the law itself. Nevertheless there are cases in which the "litera legis" is logically defective and cannot be so received as the authoritative and conclusive expression of the will of the legislature. It may be ambiguous, expressing more than one alternative meaning. It may be inconsistent, expressing two concurrent and conflicting meanings. It may be incomplete, providing for part only of

a complex subject-matter and leaving the residue unprovided for. In these cases and in these only is there any lawful scope for judicial interpretation which departs from the letter of the law. In these cases, as the authoritative formulation of the law has failed to express a single harmonious and complete idea, it may be lawfully supplemented by considerations drawn from the real or presumed purpose of the legislature and from the requirements of natural justice. In all other cases the public interest is best served in the long run by the loyal recognition on the part of the courts of the fact that their business is not to make the law or to reform it, but to obey and administer it as it stands, leaving with the legislature the responsibility for its imperfections.

LIST OF ABBREVIATIONS

ABR, Archiv für Bürgerliches Recht.

ARWP, Archiv für Rechts- und Wirtschaftsphilosophie.

AZP, Archiv für Zivilistische Praxis.

BGB, Bürgerliches Gesetzbuch (German Civil Code).

DJZ, Deutsche Juristenzeitung.

DRZ, Deutsche Richterzeitung.

GU, Gerichtsurteil (Court Decision, in Austria).

HGB, Handelsgesetzbuch (Commercial Code).

JW, Juristisches Wochenblatt.

OBGB, Oesterreichisches Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code).

OSG, Oesterreichisches Strafgesetzbuch (Austrian Penal Code).

RG, Reichsgericht (Imperial Supreme Court, Germany).

RGStr., Entscheidungen des Reichsgerichts in Strafsachen.

RGZ, Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the Imperial Court in Civil Cases).

VGH, Verwaltungs-Gerichtshof (Administrative Court).

ZSRG, Zeitschrift der Savignystiftung für Rechtsgeschichte.

ZRW, Zentralblatt für Rechtswissenschaft.

ZVR, Zeitschrift für Vergleichende Rechtswissenschaft.

SCIENCE OF LEGAL METHOD

PART I — THE PROBLEM OF THE JUDGE

CHAPTER I

JUDICIAL FREEDOM OF DECISION: ITS NECESSITY AND METHOD

By François Gény[1]

I. Its Basis

§ 1. NEED FOR AND NATURE OF FREE LEGAL DECISION. — § 2. GENERAL SCOPE OF FREE DECISION. — § 3. OBJECTIVE FACTORS IN SCIENTIFIC INVESTIGATION; PUBLIC OPINION. — § 4. SYSTEMATIC LOGIC AND THE TECHNICAL SIDE OF OUR SCIENCE; CONCEPTS AND ABSTRACT NOTIONS. — § 5. THE "NATURE OF THINGS"; THE IDEA OF LAW AS A MEANS TO AN END.

II. Its Practical Application

§ 6. THE METHOD OF FREE DECISION. — § 7. LIBERAL USE OF THIS METHOD. — § 8. THE AUTONOMY OF INDIVIDUAL WILL EXPLAINED. — § 9. EXTENT OF THE PRINCIPLE OF THE AUTONOMY OF THE WILL. — § 10. SAME

[1] [Professor of Civil Law at the University of Nancy. The selections translated are taken from sections 155–159, 169–176 of his "Méthode d'interprétation et sources en droit privé positif," Paris, 1899. He is also author of "Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique," vol. i, Paris 1914; vol. ii, Paris 1915. The translation is by *Ernest Bruncken*, of Washington, D. C.]

SUBJECT CONTINUED.—§ 11. THE PRINCIPLE OF THE EQUILIBRIUM OF INTERESTS.—§ 12. SAME SUBJECT CONTINUED.—§ 13. THE PRINCIPLE OF SUPERIOR INTEREST OF THE COMMUNITY.—§ 14. OTHER APPLICATIONS OF THE METHOD OF FREE DECISION.

I. Its Basis

§ 1. *Need for, and Nature of, Free Legal Decision.* The formal sources of positive private law (which I have tried to explain [in the preceding chapter][1a] according to their proper scope and their legitimate use), certainly furnish the best guide, in their peculiar field, for the administration of the law. We cannot conceal from ourselves, however, that even the subtlest and most penetrating interpretation of the positive manifestations of the law will not by itself satisfy all the needs of legal life. Especially — speaking now only of the source of law which at the present day is of all sources the most perfect and fertile, the written law — it is clear that we shall find, if we consider it as we ought, as an act of human intelligence and will, and therefore limited in its outlook and even more limited in its actual effect, that we cannot derive from it the full solution of all the infinite number of questions that clamor for answers in the complexities of social life, no matter how deeply we may dig into the meaning of the statutes, and how ingeniously we may construe them.

There comes a point, accordingly, where the Court can no longer rest secure on a formal rule but must trust to his own skill in finding the proper decision which he is not permitted to refuse.[2] Moreover, as long as a lawyer merely searches the statutes for rules that do not depend on his own judgment, he plays no more than

[1a] [Not translated.]

[2] See section 4, French Civil Code.

a receptive or mechanical part. His own skill enters upon the scene when it becomes a matter of discovering and using the underlying principles of every mere statutory rule, which alone make the rule valuable and pregnant. Consequently, if we take the organized body of the positive law as a whole, we may say that the central and normal part to be played by the judge consists in a personal mental activity. The manner in which this activity should be employed it is important to understand.

In the old days, when statutes, and especially statutes relating to private law, were few, fragmentary, and very incomplete, and when even customary law appeared still shifting, loosely fixed, and uncertain, the decision of the judge had a vast field before it, and almost entire freedom of exercising itself. It was immaterial, in this respect, whether the judgment was supposed to be a sort of revelation by the Deity, or based on the less archaic conception that it was an authorized expression of the public conscience.

According as customs have become more firmly established, and especially as statutes have multiplied and extended their application over constantly growing portions of private law, the part played by the personal inspiration of the judge has become narrower and at the same time more accurately defined. It has never disappeared entirely, for the reason that the formal sources have always been incapable, taken by themselves, of covering the whole field of the law. Whenever rules are made by some authority other than the courts, the discretionary functions of the latter invariably become more accentuated although within a more circumscribed sphere. But, at the same time, discretion becomes less arbitrary and subjective. Discretion always remains because it is inherent in the very nature of the judicial function;

it has a broader sweep where it can be exercised outside of all formal legal sources, and becomes less complete where it is called upon merely to give effect to such sources of law.

§ 2. *General Scope of Free Decision.* Even to-day there exists undoubtedly this double function of the judge: he is to contribute to the creation of law, and to develop further such law as has already been formulated. The legislator himself is not even in a position to restrain his discretion arbitrarily. Limitations may be found, however, in direct and imperative provisions of the written law, or in custom. Within the bounds left to the judge by these positive rules he must exercise his personal activity. The thing for us to consider in this place is the nature of this activity as regards the subject-matters to which it extends, the precise manner in which it works, and the foundations on which it is based.

Whenever it is the business of a judge to discover what the law is in fields in which it has not yet been formulated, his functions have an appearance analogous to that of the legislator himself. Leaving aside for the present the fact that the Court intervenes only when a particular state of facts has actually arisen to which the law must be applied — by no means a negligible distinction, but one which just now is for us of secondary importance — the considerations that must guide the judge in accordance with the end to be attained are exactly the same as those which would influence the legislator. For the one as well as the other aims at promoting by an appropriate rule the ends of justice and social utility. I should not hesitate, when the formal sources are silent or insufficient, to prescribe as the general guide of the judge the following outline: he should formulate his decision in accordance with the same considerations which the legislator would have in mind

if he were to prescribe rules relating to the question at issue. Yet there is one important difference between the function of the judge and that of the legislator. The latter is surrounded by no barriers preventing him from considering the circumstances in every one of its aspects, because he is called upon to establish an entirely abstract rule. The Court, on the other hand, renders his decision on a particular and actual state of facts, so that his problem becomes very concrete. According to the spirit of our judicial system, and in order to avoid becoming arbitrary, he must rid himself as far as possible of all personal influences, as well as of those which arise from the particular circumstances of the case before him, so as to base his legal decision on nothing but the objective elements constituting the case. Here is the reason why the name I have given to this function of the judge, free decision on the basis of scientific investigation, seems to me justified. It is free, because no positive outward authority compels him to decide as he does; it is scientific, because it finds its solid foundations in nothing but the objective elements which legal science must reveal to him.

What I have said of the courts, which are the official and authoritative administrators of the positive law, applies necessarily also not only to the practising attorney but to the theoretical or critical scholar interpreting the law. It is the part of the latter simply to do the preliminary work so that the judiciary may put the results into practical effect. The work of the judge determines what work the theoretical scholar is to do. The latter escapes the difficulty caused by the direct effects of the troublesome or suspicious influence of concrete cases, but the objective point of all his efforts is at bottom the adaptation of the latent rules of the law to all the data of social life.

Thus the method of legal science in this field of free research which we now have in mind must have for its goal the discovery, whenever the formal sources fail, of the objective factors to which all problems of positive law must look for their solution.

§ 3. *Objective Factors in Scientific Investigation; Public Opinion.* From the point we have now reached, so wide a field and such far-off horizons stretch out before us that we cannot possibly, in this cursory sketch, deal with all the detail; so I find myself constrained to limit myself to outlining a few characteristics of the subject. To study its objective realities in a satisfactory fashion we should have to descend to the very roots of the constitution of humanity and discover the ultimate foundations of the ends for which it exists. Then we should have to return to the phenomena which form the essential structure and nourish the continuous life current of society.

No doubt we should not blind ourselves to the fact that an examination of all these great problems which form the natural field for a broad philosophy of the law is for the science of positive law also of capital importance; and I propose to defend myself strenuously against any charge of yielding to the naturalistic or agnostic tendencies that are now so fashionable, as I know very well. Personally, however, I am of the opinion that these tendencies are irreconcilable with the true scientific spirit, and fatal to its effective application to actual practice.

Yet it will have to suffice, provisionally at least (and with the reservation that I may come back to this whole side of my subject in a larger manner and in another study), for our present purposes to accept the ideas of common sense and common opinion regarding the nature of our social organization and to see what

help we can get for our development of private law from a careful investigation of the conditions of human life and a judicious employment of our own human nature.

The question is, therefore: How can the administration of positive law, when the Court is left to itself without help from statute or custom, deal with objective data so as to satisfy the requirements of life without incurring the reproach of being arbitrary, and how should it proceed?

Before everything else I should get rid of an idea which under the social and economic conditions of our epoch affords many temptations. This idea is the underlying conception of the theory upheld by the Historical School in the various more or less definite forms it has assumed in the minds of a number of eminent thinkers. It is difficult to escape its influence altogether, and yet it seems to me as if it ought to be entirely banished from all good legal method. That is the idea that public opinion, representing the general feeling, more or less conscious, of the people interested, can legitimately suggest to the Court the solutions of juridical problems which he is seeking. Aside from the almost insurmountable difficulty of determining in a convincing manner what the state of public opinion may be regarding any given legal question, I believe that the common judgment, as long as it has not been transformed into an actual custom, ought not to be held to have authority to impose itself on the courts for the solution of legal problems. Even in the legislative sphere it seems to me very doubtful whether those intrusted with the duty of establishing general legal rules ought to be guided principally by public opinion, which is always unstable and very little sure of itself. In any case, however, where we are dealing with the administration of law supposed to be already in

existence, I do not see what serious reason could be given for basing decisions on the recognized influence of general feeling regarding the matter. I do not intend to say by any means that the Court should absolutely refuse to consider public opinion. In so far as it is itself a social fact which must be taken into account, it cannot fail to demand his attention. What I mean to insist upon is that no matter how firmly settled public opinion may seem to be, it must not be allowed to determine the judgment of the Court, nor to serve him as a test showing what the law is, for the simple reason that it cannot pretend to be proof of the truth regarding existing conditions, and the only thing to discover and apply practically is that truth.

Thus the Court will have to rely upon himself and find no guide except the nature of things themselves. That nature of things, fertilized and developed by systematic logic, will be the subject-matter of his investigations.

§ 4. *Systematic Logic and the Technical Side of Our Science; Concepts and Abstract Notions.* Now let us first take a look at the last-named factor in our method.

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It is essential, for a proper understanding of the subject, to keep apart logic in the proper sense and legal technic. Logic in its proper sense has a legitimate and necessary part to play in the administration of the law whenever there is a question of discovering the true content of some expression of will, be it that of a legal command or of the intention of an individual to which the positive law gives effect. The same thing is true whenever it becomes necessary to reason out the practical consequences and scope of a legal principle derived from the nature of things and objective realities.

The function of legal technic is something quite different. Lawyers look at the complex and moving realities of social life, which it is their duty to reduce to order, and upon the varying interests involved, from a very special angle, and submit these realities to artificial processes which transform, and sometimes deform, their effective nature. Thus certain economic operations, which naturally would be variable and uncertain in their character, are cast into a firm and unchanging mold, or, as one might say, change their shape by passing through the crucible of the law. For instance, the financial operation of exchange, which in a way arises simply from the acts of the parties in interest, becomes clothed with a definite and almost rigid legal character in the form of a bill of exchange, with the conditions and effects imposed on it by positive law. In a more general way it may be said that legal technic fixes the characteristic features of those facts from which legal consequences may flow, by defining these consequences itself. Thereby it establishes, perhaps not exactly a sort of hierarchy, but at least a general scheme within which the actual facts of social life must find a place, and to which they must to some extent accommodate themselves. In so far as by these processes legal technic helps to develop and makes easier the relations of human life, or, to follow a pregnant expression used by Jhering, procures the formal conditions which make the law effective, it has a very legitimate part to play. Under existing conditions of society the creation of the means by which this technic works is the exclusive business of the legislator, or in exceptional cases of custom; but it is the duty of the courts to strengthen its functions by ingeniously harmonizing the various parts of the system of legal technic and make it function more smoothly by constantly adapting means to the end.

The function of legal technic is not limited, however, to making sure that the ultimate object of all law is attained by its processes of synthesis and simplification. The reason for this arises from the very nature of legal technic; it is the effect of the artificial character inherent in it, and of the almost inappreciable line which separates generalizations of observed facts from imagined abstractions. There is still another task before it, and in this regard the part of legal administration greatly exceeds that of legislation. By means of legal technic we may isolate ideas from realities, attempt to get abstract general notions of the component elements of the law and mold them into abstract concepts. From these again we may deduce abstract "constructions" to which the fact will have to be adapted, sometimes by main force. In another place I have spoken of the dangers which arise from these technical operations; but my consciousness of such dangers has not led me to be in favor of the complete exclusion of legal concepts and the "constructions" deduced from them. Not only do I not hesitate to say that the courts are bound to accept the formal concepts which have been positively embodied in the statutes, and to deduce from them all the consequences to which they lead, just as they would do from every other expression of the intention of the law. I go further and ascribe to the function of administering the law the full power of creating on its own account similar concepts. As I see it, the greatest usefulness of abstract concepts is found not in helping to build up a systematic theory of the law, but in this, that they may become a sure guide of the judge in applying the law to the facts, and that at the same time they have the power, if skillfully handled, of increasing the scope and fecundity of legal principles. However, while I do insist on the legitimacy of these technical operations, I also

affirm that in employing them the Court should always be guided by two important considerations. On the one hand, it would absolutely be an error to believe that every legal rule must necessarily revolve around some ideal concept which gives it life and determines its scope. Quite to the contrary, I maintain as incontrovertible â priori that the strongest and most certain precepts of the law are those which spring directly from the nature of things without the intervention of some abstract concept, which in all cases cannot but deviate in some points from reality. On the other hand, while sometimes it may appear useful to have recourse to concepts and abstract "constructions" by the employment of these technical operations, the judge must never forget that these take him outside of the realm of those objective realities which alone should guide his judgment. He should guard against believing himself bound by these concepts (except where the statutes themselves adopt them) and never take them for more than scientific hypotheses, which are no doubt capable of helping him in conducting his investigations but are never to be taken as established realities. Therefore the needs of actual life must never be sacrificed to mere concepts.

These observations seem to mark pretty well the boundaries one should not exceed in logical systematization. It appears pretty clearly from them that the main support of the administration of the law must be sought in something else if its proper functioning is to be secured. Instead of relying on abstract concepts of the mind, which are in their very origin inconstant and uncertain, the Court needs to avail himself of the firm principles which only a careful investigation of the nature of things themselves can furnish.

§ 5. *The Nature of Things; the Idea of Law as Means to an End.* Thus we have at last come to inquire into

the principal task of free decision on the basis of scientific research, which is the examination of the nature of things themselves. That is an idea which may lack precision but has been found very pregnant. It was introduced into the investigations of jurists by the German, Runde, about 1791, and has since that time been much employed by German legal science as a substitute for the formal sources of positive law. On the other hand its intrinsic merits have more than once been disputed, and Windscheid used to stigmatize it as a disreputable expression.

Perhaps the discredit with which this notion — in my opinion an indispensable one in any system of positive law — is threatened may be avoided if we define its nature a little more than has heretofore been done and show what good results it may produce.

The meaning which Runde attached to this expression and which has been generally accepted, according to which the nature of things may be considered as one of the sources ("lato sensu") of positive law, rests upon the following assumption: the relations of social life, or putting it more generally, the facts underlying every juridical organism, carry within themselves the conditions under which they may be in equilibrium and indicate themselves, if one may say so, the rules by which they ought to be governed. If that is so, nothing would appear to be easier than to examine all human relations in detail in order to distinguish those among them which require legal recognition, and then find what law should govern them in all cases where there are no formal sources. The only trouble with this proposition is that in trying to apply this method one will soon find that the assumption was accepted a little hastily. It fails in this respect at least, that even the most minute study of the relations of life, although the weighing of the interests

involved may be facilitated thereby, is by itself powerless to indicate clearly and accurately its rule of law. In order to make the method practicable one needs more certain standards. The law that harmonizes the facts must be sought outside of the facts themselves.

Now let us return to the main point of our discussion. The question is, how can we create by a scientific effort a sort of common law, general in its nature and subsidiary in its function, which may supplement the formal sources when they fail, and give a general direction to the whole current of legal life? Will the law so found be an immutable type, or will it vary, at least in some of its parts, in accordance with the circumstances of the times? Will it be a law of universal application or will it not exhibit certain national differences? These, however, are rather secondary questions, on the whole, and they cannot be solved â priori, for the answers will depend on the nature of the elements of which this necessary common law is composed. The important thing above all, however, is to know how this positive common law may be constituted.

To solve this question, a seductive idea has been proposed, the idea of scope and purpose, or the law as means to an end.[3] Starting from the truth suggested by experience and ordinary reasoning, that every act of will depends on a purpose to be achieved, and observing further that every system of law has for its subject-matter principally acts of human will, one can easily come to the conclusion that such a system ought to be entirely dominated by practical ends. Hence the maxim formulated by Jhering: the end to be sought creates the entire body of law. According to this all that would be necessary to find the rule that should regulate any given relation of society would be to find what end is to be

[3] *Jhering*, "Der Zweck im Recht" [the first volume of which is translated in this series under the title of "Law as a Means to an End"].

accomplished. However, it is easy to see that such a conception presupposes in practice that the ends which are to be attained by each legal rule are already known. This proposition, again, could not possibly be put into practice without a very clear and definite consciousness of the ultimate ends toward which human life is tending. It appears, therefore, that this maxim may be a very valuable instrument of investigation but only puts the ultimate solution of the problem further off.

How then shall we find the ultimate standard by which to measure the juridical value of social facts? Without entering upon the transcendental regions of our moral nature, I believe that we shall easily come to an agreement on the proposition that every body of laws should tend toward realizing, in the life of humanity, on the one hand an ideal of justice, on the other an ideal of utility, meaning by the latter expression that which by common opinion is considered as promoting the welfare of the greater number. The two great guide-posts of our investigation should be, therefore, justice and general utility. To be sure, that is still far from giving us complete light on the subject, because the two ideas so represented are of themselves nothing but empty forms which must be given a content before we can draw out of them all we need for our present purposes.

Precisely at this point is the place for the idea of the "nature of things" such as, according to my view, it should be understood. It is not enough merely to consider and analyze in detail all the facts of the life of our society, to observe their mutual relations, to discern how they reciprocally react upon each other. We must also boldly rely upon our moral consciousness and our reasoning powers, and by the use of these faculties trace the laws which govern these phenomena. Thus we shall employ all our resources for the construction of a truly

scientific system of the kind of common law of which we are in search.

From this point of view the field of our investigations becomes definite and complete. On the one side, we address ourselves to reason and conscience in order to discover within our own breasts the foundations of justice; on the other side, we must study social phenomena in order to grasp the laws which harmonize them and the principles which will arrange them in order. Of these two tasks which we must perform, the last-named finds a firm basis in what may be called the nature of positive things, which in their totality form what one might call the atmosphere of social life. The other rests on a more recondite foundation, it cannot be attacked by observation and the experience of the senses, but nevertheless forms one of the necessary conditions of the practical working of the law. Attempts to resolve one of these factors into the other have all been in vain. Notwithstanding various prejudices that are still alive, both have continued to exert their influence on the life of the law. Well convinced as I am of their necessity I have no hesitancy in giving to each its proper place and function.

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II. Practical Application of the Principle of Freedom of Judicial Decision

§ 6. *The Method of Free Decision.* The reader will perhaps wish to be told in a somewhat more direct fashion how the method of free legal decision, which is founded on such diverse scientific grounds, will work out in such a way as to preserve both its own peculiar characteristics and the necessary degree of certainty. He will wish to see what results may be expected by being shown some facts learned from actual experience.

In regard to the first of these points, it must be said that above all things every jurist must become as clear as possible in his own mind on the problem of what constitutes his peculiar function in the life of society. When he has become fully conscious of the nature of his task, he will find in that very consciousness the best guide to conduct him straight towards the clearly conceived goal. Now it cannot be repeated too often that legal science is essentially a science of action, having no possible purpose except that of finding the necessary rules for the government of certain human relations by external social sanctions. It is based on facts of social life which it aims to order and arrange in such a way that the consequences flowing from them are those which are socially desirable.

Consequently, legal science must first of all try to analyze the human facts into their ultimate elements. As it cannot master these elements without arranging them in certain general series and reducing them to certain types, analysis must necessarily be supplemented by classification, which must already show more or less clearly some definite goal. The conception of this goal will become still clearer and bring the final result into closer view, when the rule has been established which ought to govern the relations so analyzed and classified. To find this rule for the government of the facts is the peculiar work of legal science. Although the facts themselves will in part suggest the rule, yet its real origin must be sought in a superior order of ideas which can be discovered only by an effort of reasoning.

I am very far from depreciating the importance of simple observation of social facts; I do not even hesitate to give to it the first place among the indispensable elements of juridical method, without which it would be impossible even to put the problems correctly. Yet this

alone could not, as has sometimes been contended, bring us to the desired goal of our science, not even if we join to it rational classification. We need also a process of reasoning which starts from an intuition supplemented by the feeling for what is just, and arrives at exact conclusions by a series of deductions under the constant guidance and control of practical common sense.

In administering the law one is obliged first of all to discover some general and abstract rule to be applied to the special combinations of concrete facts which actual life produces. In all cases the judge should therefore start from what would be the normal rule. That means he should first propose to himself the most general rule applicable to the state of facts before him as a type; he should contemplate both the conditions giving rise to the rule and the results flowing from it without regard for any unusual features or anticipation of any but the probable consequences, except in so far as these unusual features or consequences arise from the particular nature of the facts themselves. These will have to be considered in selecting the rule itself.

Moreover, we must not forget that the free decision of the judge only extends to the cases where the formal sources, be they statutes or custom, fail him. The exercise of his freedom is broad or narrow, and the results of his reasoning are more or less certain, according as he is able to base it on analogy, or on elements in the facts which suggest an established view of society, or whether in the absence of all positive support he is left altogether to his own judgment.

Even within the limited sphere so described, it does not seem to me that free scientific legal decision can create legal rules with the same latitude as that belonging to statute or custom. Without stopping to indicate all the limitations surrounding its creative capacity,

it will suffice for me to point out two lines of thought which, among a good many others, seem to justify my assertion. On the one hand, some relations are governed by general principles depending, sometimes only latently, on our formal legal arrangement in so complete and exclusive a manner that there remains no opening for free legal decision without going outside of its proper functions and exceeding its province within the general conditions of social life as they actually exist. Thus it would seem to me that a court could not impose in this manner a legal incapacity (over and beyond the recognition of a natural capacity already existing) or an artificial restriction on the liberty of contract; nor could it thus create a privilege in contravention of the principle of equality before the law. Nor would it be possible to make by free legal decision, according to the methods of legal science, detailed rules such as are required for the exercise of certain rights, for instance the regulation of the manner of proving certain facts, or what is to be regarded as legal publication or notice, the forms of legal transactions, prescription, limitations, forfeitures, and many similar things. Speaking broadly, everything which constitutes the outward, and if one may say so, moldable shell of the law, is outside of the realm of free decision and must be regulated exclusively by statute or custom.

§ 7. *The Liberal Use of This Method.* In order to shed light on the practical working of this method and to show its results, this would be the place for its application to a number of selected, concrete cases from which its actual working could be learned. It is not possible, however, in so general a study of so vast a subject as we are making, to furnish, at this point, illustrations of the argument I have offered above. For such illustrations would not demonstrate the truth of our proposition sufficiently,

unless the facts were analyzed most minutely to the last details. I shall be obliged, therefore, to confine myself for the present, by the aid of what others have already done and adding a few personal observations to what has already become an acknowledged part of legal science, to calling attention to certain important theories. The method of free decision on the basis of legal science, such as I have briefly explained, may be presumed, â priori, to be capable of suggesting probable solutions regarding the problem of supplementing the written law which by itself does not suffice for the needs of daily life. Moreover, I do not claim any intention of deciding the whole matter in a manner sufficient for a systematic treatise. I merely wish to see, if possible, a little progress made, without taking any sides regarding the ultimate solution of problems which would require investigations which I cannot undertake.

In order to limit my task and at the same time make it more definite, I shall take all the following observations (which will necessarily be incomplete and more or less cursory) from a field which one may describe as lying in the very center and constituting the most typical portion of private law, — the rules relating to transactions between living persons, affecting estates of various kinds.

This whole vast subject, and for that matter all other topics in private law, may, as it seems to me, be treated from the point of view of three different orders of ideas, to wit:

Sometimes the regulation of inheritable interests emanates from the free and conscious wills of persons who are capable of binding themselves by contracts. The positive law has nothing to do with it except by recognizing the evidence of such acts of will as evidence of legal transactions. In such cases we have nothing to

do except to determine on what terms and to what extent these persons have bound themselves; after that, we must find out what the subject-matter amounts to; and possibly we must supplement the acts of parties, by applying legal presumptions or by interpretation of the terms.

At other times it will happen that the will of the parties cannot become effective because it is repugnant to the requirements of social order. In such cases the law must step in to place limitations on the will of individuals, or to frustrate it altogether. In such cases an overruling and irresistible power substitutes its authority for that of a voluntary arrangement which it prohibits. The positive law itself makes here those rules which it opposes to the divergent wills of individuals so as to govern or restrain them.

Finally, there are cases where there is not, or even cannot possibly be, any action of conscious wills. Instead there are facts or circumstances regarding which the direct influence of free human action cannot be conceived, or at least is not exercised. As a consequence, it becomes the function of the law itself to regulate those interests which in their nature are independent of the wills of individuals.

To these three orders of ideas correspond three kinds of legal rules, which are fairly distinct from each other: one kind merely guides or supplements individual acts of will; the second embodies legal commands or prohibitions; the third constitutes simply regulations of an external sort.

As our social organization is actually constituted, we shall find that each of these three forms of legal rule is governed by a general and essential principle in harmony with the object which each class of rules has in view. Each set of rules, in fact, is the outgrowth of its

principle. I think one may reduce these three principles to a simple formula in accordance with our most usual terminology in this manner: 1. The principle of autonomous will. 2. The principle of public order or superior interest. 3. The principle of equilibrium of private interests.

To be sure, these principles, which in practice will often combine and interlace with each other, are found to animate our whole system of law, and can be inferred also from its formal sources, especially the codes, in so far as these contain formal rules relating to each of the spheres indicated above. However, here as everywhere, the formal sources are not sufficient for the purposes of the administration of the law in its entirety. Where they are mute or incomplete, free scientific investigation must supplement them and find the rule which governs such relations in accordance with the method I have proposed above. Now it seems to me that a few brief considerations will make it easily intelligible how the application of this method will help the law to make real and truly scientific progress.

§ 8. *The Autonomy of Individual Will Explained.* In the domain of individual activity, seeking its own ends, the modern law performs its proper functions best by allowing full independence so long as such activities do not come into conflict with superior interests. This principle of the autonomy of the individual will developed gradually and unnoticed from the time when the ancient social forms were disappearing. It was, in our country and in civil relations at least, emphasized by the decay of primitive formalism, beginning about the thirteenth century. It continued to develop without interruption, but is seen at the present day to be only the expression of the necessary condition of our whole social organization. One may say that it is

contained, by implication, in certain provisions of our written public law; in its broadest form, perhaps, in section 4 of the Declaration of Rights of 1789, which reads: "Liberty consists in the right of doing anything which does not injure another." At any rate, the authors of the Civil Code have recognized it in the most concrete manner by enacting it into law as the freedom of private contract,[4] or perhaps one may say that they have done so in a still broader fashion by establishing the freedom of legal transactions.

All this may appear, in our day, as quite beyond dispute. It may be different, however, when it comes to putting this principle into effect to its full extent, and to developing its essence until it penetrates to the very heart of our daily life, or even when it is merely a question of expressing the applications of the principle with that degree of certainty which practical affairs demand. Is it always true that in such cases we interpret the law with a sufficiently deep and subtle understanding of the social and psychological elements on which the formula of the autonomy of the will must be based and from which its application takes its life? May one not imagine that there may be new and beneficial applications of the principle discovered by a more unhampered study of these elements?

Take the notable case of a legal transaction validly performed and unquestionably recognized by the law, let us say a contract if you will. While we emphasize, in principle, the power of individual wills which constitutes it, yet are we not often harking back to and docilely accepting the consequences of the Roman categories which, as we must admit, still dominate on the whole our written law in regard to these subjects? Although these categories may quite legitimately continue

[4] See sections 537, par. 1; 1134; 1156 seq., Civil Code.

to be used as throwing light on the real intentions of the parties, we ought not to forget that in our day the statutory provisions based on these categories are to be taken merely as supplementing the actual intentions of the parties. They are never mandatory, but on the contrary may be modified where the actual facts suggest the propriety of such modification. We may even be justified in overcoming them by presumptions inconsistent with them, whenever the circumstances of a case show that this would be proper. At any rate, we may and should establish new rules to supply what is omitted in the statutes and the customary law, in order to put into full effect the principle of the autonomy of the will of the parties. Furthermore, we must remember that the traditional categories do not comprise everything; that it was quite possible for the parties to agree upon something "sui generis," provided only that higher rights, and especially the vested rights of third parties, are not infringed thereby.

In this way it has been possible, although the Code says nothing about it, to allow in our modern French law the validity of a contract for substitution of debtors with the consent of the two parties concerned, in such manner that the first debtor may pass the debt on to the second for payment, without the previous consent of the creditor, although of course the latter cannot be bound thereby. Similarly, the doctrine will no doubt find favor that the mere will of the parties may establish novel kinds of rights "in rem," provided only that they do not offend against the fundamental principles of our social order. In the same way it will be easily possible to add to the forms of property come down to us from the Romans, new ones based simply on the free agreement of the parties, especially new forms of ownership in common adapted to our economic needs, new forms of trust described in the

deed of trust itself; there may be also new forms of easements besides the servitudes expressly recognized by the law, and other ways of establishing a divided ownership, whereby the utilization of property may be diversified and its value increased. All that may be possible simply by further developing the principle of autonomous wills, provided always that the rights of third parties are not affected and that the interests of the commonwealth are protected. I do not fail to recognize that frequently these general reservations will require considerable restrictions, and that sometimes the method of free decision will not suffice to formulate these restrictions independently of legislation. That method, however, will at least be capable of preparing the way for the intervention of other sources of positive law, such as statutes and custom, which may complete the body of rules already outlined by the use of the free decision method. If anybody should hesitate before the practical difficulties in the way of applying that method as here suggested, he would not, at least, decline to interpret the contracts which are currently made in the course of business without constantly referring them to some one of the legally recognized types, and would prefer to uphold them directly in accordance with the principle of the autonomy of the will. Now, the will of the parties, when it finds no typical formulas which it can use, will proceed in accordance with the moral, psychological, economic, briefly, the social circumstances under which it tries to accomplish its aims. Any doubt regarding the intention of the parties can be solved only by presumptions based upon an examination of these circumstances. Where there is no presumption regarding the intention of the parties in the strict legal sense, it will be incumbent upon the court to base its conclusion on a consideration of all the interests to be considered. A balance between these interests

would establish a probability that such was the real intention of the parties, and would properly take the place of direct evidence regarding their intention where that cannot be had. One can readily see that an almost boundless field for the activity of the method of free decision is here opened up; especially if the courts will attach all the weight that belongs to it to the doctrine of good faith, which we may say constitutes in our modern law the pivot around which the play of autonomous individual wills must revolve.

I desire, however, to call attention to still another point in connection with the same general theory.

§ 9. *The Extent of the Principle of the Autonomy of Individual Will.* In relation to legal transactions, it is not enough to show the consequences growing out of the principle of the autonomy of the will. It is also necessary, and in fact that is the first task of the court where a case is to be decided on the principles of free decision, to analyze the elements constituting the principle and to define its main outlines. What are the circumstances under which the mere will of the parties makes the law of the case? Some people have erred by assuming that in order to solve this problem one had but to consider the intentions of the parties and the circumstances from which these can be inferred. That is plainly a begging of the question, and a confusion of the effects with the conditions from which they arise. In order to determine the latter, aside from the expressions of the parties to the transaction themselves, one must obviously take into account both the social and individual interests involved. These interests must not only be manifest and firmly insisted on, without psychological duress, so to speak, and with a degree of consciousness psychologically certain, but also make it necessary that the positive

law will recognize without hesitancy the obligatory character of the transaction.

If we could only bring ourselves to be guided by these ideas, and rid ourselves at the same time of the obsession of abstract concepts, which here as everywhere is pernicious, we might perhaps succeed in extending very notably our theory of the formation of contracts. Especially with regard to questions for the solution of which the statute really affords no help at all, as for instance contracts between absent parties,[5] would we not soon learn to add to the merely psychological considerations, which are too often made the only basis of our theory, other considerations drawn from a wider reality? Such other considerations would show all the more perfectly what the requirements of practical life and the motives inspiring it may be, because they would tend away from rigid rules and be fit to vary and supplement the conclusions drawn from the underlying principle without failing to give it due effect, so as to satisfy all the interests involved. I believe that it is not difficult to show how the modern development of the law even now tends in this direction. One can be but glad of this, and may wish that the movement become still more decidedly so, when he notices also in some recent theoretical works an obvious inclination to make use of analogous methods of reasoning.

In a similar manner, it is also likely that the law will become less exacting regarding the complete and perfect meeting of the wills which our all too rigid theory proclaims necessary in order that there shall be any contract at all. As a matter of fact, our practice in this regard is not at all in agreement with our theory, but rather raises an irresistible protest against the pretensions of our strict logic, although we may pass the matter over in

[5] "Non obstat," section 932, line 2, of the Civil Code.

silence. For instance, our theory insists that the subject-matter of a contract must be definitely expressed or at least that it must be definable from the terms of the contract itself; yet do we not every day see contracts for piecework entered into, without any definite statement of the price to be paid for the completed job? Or who would think, when he has given a job to some cabinet-maker or locksmith without stipulating for the compensation, or when he has been treated by a physician without first agreeing on his fee, that such a contract could not be enforced and that he may repudiate his obligation because the sum to be paid had not been fixed beforehand or could not be ascertained from the terms of the contract itself? We know well enough that in such cases the court will not hesitate to complete the contract the parties have left defective. I suppose that it will be said: Such results are to be explained by the fact that there was a tacit understanding, a fixed usage, which in good faith becomes a part of every such contract. That is precisely what I insist on, that the influence of good faith, which inheres in the making of every contract, should be frankly recognized; I am persuaded that this new element, introduced into a theory which heretofore recognized nothing but logical deductions, would have a most beneficial effect by softening its outlines and making its structure less narrow.

Furthermore, I have no doubt that the same trend of ideas will lead us to recognize this: an imperfect and incomplete understanding between two persons regarding the essential points of the business with which they are mutually dealing, while it cannot establish any binding obligation, according to the strict doctrine, may yet, in a number of cases, be treated like an actual contract, and will not be left altogether without legal possibility of enforcement. Here again some very practical observations

will give us the foundation for some useful steps forward in the development of our science. It will presently occur to us to ask whether in fact the meeting of the minds is ever exact. Perhaps the result of our investigation will be that we shall attain a clearer view of the following truth, of which we are certainly not ignorant even now, but which we have hesitated to adopt in its entirety. The theory of contract, which has heretofore been dominated altogether by the psychological idea of agreement, will have to look at that idea hereafter in the light thrown upon it by the facts of life in society. In other words, it is not so important for the lawyer to know under what conditions it is metaphysically incontestable that the minds of the parties have met, as to know under what circumstances the approach of their wills is close enough to deserve being upheld by the law. After we have reached this point, it seems clear to me that the problem can be further solved only by a detailed examination of the nature of the circumstances surrounding the case; and this should be made not merely from the point of view of individual psychology, but even more from that of social psychology, of ethical and economic requirements, and more generally still, of all considerations which civilized life, interpreted by the aid of science, may suggest.

§ 10. *The Same Subject Continued.* Now that we have come so far, I imagine that we cannot very well avoid touching upon a delicate question which has but recently been well formulated, and which we shall treat by a method freer from prejudice and, I trust, also more fruitful than that which has heretofore been employed. Is not the autonomy of individual will a part of our positive law elsewhere as well as where it is exhibited in the making of a contract, properly so called? Is it not even more distinctly present in legal acts that issue

from a single will affecting living persons? Or, to employ a more common and at the same time clearer phrase, may not a simple promise, expressing but the will of one party, become the basis of a legal obligation, aside from all questions of acceptance?

If first we turn, for the solution of this question, to our formal sources of law as they are now actually in force, we shall have to admit, I think, that these do not take us very far.

Of clearly established customary law, I believe, we cannot speak at all, in modern days, so far as this subject in any general aspect is concerned. As for the written law, it would seem pretty difficult to find therein any positive denial of the legal effectiveness of a one-sided act of will, even aside from testamentary dispositions. We need not speak of certain declarations with legal consequences, such as the legitimization of an illegitimate child, the acceptance of succession, the renunciation of succession, or of community of property [between husband and wife], or the offer of payment of recorded mortgages by a new purchaser of the land — all of which transactions imply in their very nature that there is but one party to them. Our law knows another class of such acts which all have the characteristic that one person becomes richer by the independent will of another — such as, for instance, the renunciation of various rights, like a usufruct, a mortgage debt, and various sorts of easement. In these cases the statute might easily have made the effect of the act dependent on acceptance by the beneficiary. I know the answer will be that these are exceptions to the ordinary rule, which were intended as such by the legislature, as also in the case of occupation and analogous acts; some persons will even go so far as to declare it impossible that the act of one person, done with that very purpose in view, and with the

intention of being bound thereby, can create an obligation on the part of another person. However, if one were to inquire into the reason for this common opinion or the explanation for this widely spread prejudice, he would find it difficult to discover anything except that there is no provision in our statutes expressly authorizing the creation of a right by the one-sided act of an individual, and that such silence is sufficient to prohibit. The implied reasoning may perhaps be expressed still more exactly in this fashion: the Civil Code, by enumeration, limits the sources from which obligations may be derived.[6] This enumeration does not mention a one-sided act of will, consequently such an act cannot be the source of an obligation. I venture to say that such arguments may appear quite incontestable, and yet they do not convince me. I need not discuss the point that perhaps a one-sided promise may after all be contained in one of the enumerated classes of section 1370, which are decidedly vague and general. I should first like to know on what ground, in our modern law, the assertion can be based that the statute enumerates all the sources from which an obligation may spring and excludes all others. In other words, as I deny both the major and the minor premise of the syllogism held up to me, I must have serious doubts about the conclusion.

Nor would it be possible to aid or fortify the above argument by saying that the theory of the Code which bases contracts on the consent of the parties[7] necessarily excludes the idea that a simple promise can bind the promisor even before it has been accepted. We may admit that the legislature intended such a result under ordinary circumstances in the case of an offer to make a contract; that, however, amounts merely to this, — that in the

[6] Book 3, title 3, and section 1370, Civil Code.

[7] Sections 1108 seq.

absence of ulterior reasons, such an offer is not binding. One cannot legitimately draw therefrom the conclusion either that the quality of not being binding is essential to the very nature of such an offer, or, still less, that under all circumstances whatsoever a declaration of intention to bind oneself, as long as it remains a mere promise, is ineffective and inoperative. Briefly, from a strictly legal standpoint and according to the rules of sane interpretation, if one does not want to go beyond the thought and intention of the legislator, he must hold that the latter, never having thought of the question raised by us, cannot have intended to solve it. Or even we might admit that he must be assumed to have thought of it and decided it negatively in the recesses of his mind and subconsciously, as it were, because he must have been under the influence of a historical tradition. That, however, is rather vague in itself, and such an unexpressed and secret meaning cannot be held to have any force for the interpretation of the rule. Consequently, as long as both the statute and the customary law are silent on the point, we must solve the difficulty by the method of free decision on the basis of scientific inquiry.

Now, when we have thus been authorized to take possession of the field, shall we unhesitatingly answer the question in the affirmative, as is the wont of bold reformers, possibly by dwelling upon the unlimited freedom of the human will, the sovereignty of individual volition? Or perhaps by insisting on the needs of society under the new conditions created by modern civilization, which demand imperiously that everybody shall be allowed as he will to take advantage of promises by which another has chosen to bind himself by his free will? That would be, in my opinion, to go far beyond the mark, and to expose our new idea to a shock from which it would never recover. The most one can really say on this point in a

general way is, I believe, that nothing in our system of positive law stands in the way of holding a one-sided promise binding, and that the binding nature of such a promise even follows, primâ facie at least, as a very natural consequence of that principle of the autonomy of the will which is the outcome of our modern conditions of society. At the same time, there is also no reason why absolutely every obligation of this kind should be upheld. Consequently, and because in practice the question will always be what particular promises of this kind ought to be upheld as binding, it will never be possible to find the answer without a close investigation of the dangers and advantages of each particular promise of this nature.

Now we understand very well that a unilaterally expressed intention ought never to be enforceable except when it was seriously and firmly held with the conscious desire that it should be binding. However, in a good many instances, and in the absence of some customary or statutory form of expressing the intention, it will be difficult and not without danger to hold every promise, where the promisor at the time wishes to be bound, sufficiently serious and firm. It will be wise, therefore, to scrutinize carefully the character of such declarations and to assess them at their true psychological value. Likewise, even where the firm intention cannot be disputed, one would not be able to appreciate its true legal weight without first determining whether there exists a real interest of society requiring that such a declaration be binding of itself without waiting until the party to derive the benefit therefrom has consented and thereby raised it to the dignity of a contract in the proper sense. This determination will be the result of an investigation of the moral, political, economic, in fine all the social, advantages of such promises.

From this point of view, we shall be inclined to declare binding not all one-sided promises, but only those which seem necessary in order to accomplish certain desirable social ends which cannot be accomplished in any other way, provided that they are not of such a nature as to create an uncertainty regarding the title to property, which is above all other things destructive of credit. Such binding declarations will be, no doubt, promises to pay for services rendered, subscriptions for the costs of a work to be done in the common interest, offers made in contemplation of a future contract, provided they are made with sufficient certainty; and perhaps even promises for the endowment of benevolent institutions, provided the principles of our public law are properly observed.

If we boldly recognize such promises as binding of their own force, we merely carry out and follow tendencies which, after all, are already clearly established in our legal system. For instance, in our private law, it may be true that the one-sided promise of compensation, as in the case of finding lost property, has never been recognized except on the ground of a tacitly implied contract between the promisor and the finder; yet the law does not hesitate to recognize rights growing directly out of a mere promise in other relations. At any rate, the binding character of an offer by one party to enter into a contract is at present frankly recognized during the time customarily allowed for acceptance by the other side. Again, the same is true in the case of commercial paper payable to bearer, independently of the contract from which the debt originated; or, in the cases where mortgage liens are upheld as security for debts payable to uncertain payees. Finally, the principle is illustrated by the cases where undertakings for the benefit of another are upheld although there is no principal contract

actually in existence. All these instances show plainly that our law tends to go beyond the narrow horizon of the Civil Code and to admit that by the side of the traditional classes there may be cases of binding voluntary obligations outside of any specific contract.

The same is true also in the field of administrative law. Here many of the requirements of the law of civil contracts are disregarded and subscriptions to benevolent purposes or works of public utility are much more easily held binding; here, where legacies to undetermined recipients of charity are upheld on condition that the beneficiaries can be made certain, even actual endowments by one-sided promise are possible "inter vivos" on the same condition.

When we extend our experimental test somewhat and consider the same problem by the light of history and comparative legislation, we shall find a decided confirmation of our reasoning and direct observation. We shall see that even the Roman law, which in principle rejects emphatically the recognition of a one-sided promise as the source of a binding obligation, yet admits promises of this kind as civilly binding in cases where a religious or public interest is involved, and possibly even sometimes in cases of purely private concern. Other legal systems will be found to offer different instances in accordance with the peculiar needs of their time and circumstances. Finally, the most recent and most thoroughly studied of modern legal systems, the German Civil Code of 1896, furnishes us what might be called the type of an actual, positive system of this kind, which is quite capable of serving as a model. Is not all this proof enough, drawn from the actual facts, that no absolute principle of logic commands us to reject â priori the creation of valid rights by a one-sided exercise of will, and that, quite the reverse, the needs of legal life require, not that all

one-sided promises be held binding, blindly and without distinction, but that this be done in certain carefully regulated and judiciously selected instances. A free investigation of all the circumstances — including scientific data as far as possible based on statistics and every other means of learning social facts, as well as ethical, political, and economic considerations — should determine the cases and conditions in which in the actually existing state of civilization in France it would be advisable that the power of autonomous exercise of will over private relations should receive this extension, and technical considerations of law should be utilized merely to define these instances more accurately.

§ 11. *The Principle of Equilibrium of Interests.* Finally, however, the problem of the limits which should be assigned to the principle of the autonomy of the will in the creation of individual rights, will be shown to be governed largely by a general principle which constantly manifests itself also in all those legal problems which by their very nature cannot be within the jurisdiction of the direct exercise of will by private individuals, or which have been definitely given over to some other form of regulation. This principle, which one may call that of the equilibrium of the interests concerned, must be the guide of the courts, as it should be that of the legislator and the guardians of legal custom, in all those cases where there is no sufficient and valid agreement between the parties, so that it becomes necessary to establish authoritative rules of conduct such as constitute positive legal order. The object held in view by this principle is nothing but that of giving the greatest possible satisfaction to the wishes of the various parties consistent with the realization of the social purposes of mankind. The general method of accomplishing this purpose is to recognize all the conflicting interests concerned, to

estimate their respective force, to weigh them, as it were, in the scales of justice so as to give the preponderance to the most important of them tested by some social standard, and finally to bring about that equilibrium between them which is so greatly to be desired.

It will readily appear that the legislator also proceeds in the same way when he enacts provisions intended to supplement or regulate private acts, if one analyzes in detail certain statutory provisions in cases where the conflict of interests is particularly apparent.[8] We need not speak of certain traditional doctrines which our modern statutes have adopted in an elliptic form, such as the theory of the Pauline action, with the necessary conditions under which it may be maintained according to the nature of the deed drawn into question (to wit, whether it was given for a consideration or not), and the good or bad faith of the defendant.[9] Apart, however, from these special applications of the principle, it would be easy to show how the same legislative intention reappears in the greater part of all the doctrines in our private law, even in those which are frequently explained on purely logical grounds. Such for instance is the theory of title by accession,[10] of set-off,[11] in which logic really does not come in except secondarily and, so to speak, as the technical instrument of equity, which itself is grounded on the principle of the equilibrium of interests which in all these subject-matters is entirely dominant.

[8] I cite, as they come to my mind at random, sections 549, 555, 1116, 1238, 1240, 1299, 1377 line 2, 1384, 2037, 2131, 2265, 2279–2280 of the Civil Code and 216 of the Commercial Code, as examples of particular probative value.

[9] See section 1167 of the French Civil Code; sections 446–447, Commercial Code.

[10] Sections 551–577, Civil Code.

[11] Sections 1289–1298, Civil Code.

Free legal decision on the basis of scientific investigation ought to do within its own field what the written law does for those portions of the law which have seemed to stand in need of more definite regulation. Our courts have recognized this doctrine, to the great scandal of certain authors, when they have held valid in favor of third parties acts of an heir-apparent affecting an estate which finally does not go to him — at least in some particularly equitable cases; or when they have established a whole system of presumptions in aid of title by prescription, in order to make possible or easier the proof of title to real property; and similarly when they have upheld the full force and vigor of the ancient adage: "Quae temporalia ad agendum perpetua ad excipiendum." Is not the same thing true in certain peculiarly delicate cases of conflicting interests, which have been very happily settled in actual practice, such as those growing out of the existence, at the same time and in the same property, of special mortgages and general mortgages of prior rank? It is not different when the statute is silent or ambiguous and the courts have to decide whether the surety or a third party in actual possession of the land mortgaged for the guaranteed debt are to be subrogated to the rights of the mortgagor.[12] Again, how can the legal maxims applicable to such matters as the secrecy of confidential letters, the ownership of letters sent, or the right to use a family name, which can be understood in so many different ways, be satisfactorily and equitably applied except by balancing all the interests involved one with the other? As a matter of fact, the tendency recently has been less and less to refrain from accepting such a method of interpretation, even where the result seems to run counter to some positive statute, at least where the statutory provisions

[12] As provided by section 1251, subs. 3 of the Civil Code.

leave an opportunity for broad construction in favor of an evident equity. Occasionally the courts have gone even farther in the direction of free decision and forgotten the bounds necessarily set to the creation of law by this method, notably in those cases where forms of lien have been recognized for which there was no provision at all in the statute.

On condition, however, that such excesses be avoided, of committing which there is at present little danger anyhow, on account of traditional tendencies to the contrary, the science of administering the law could not do better than frankly to adopt, where the formal sources of law are silent, this method: to seek the solution of all legal questions, which necessarily grow out of the conflict of various interests, by means of an accurate estimating of the relative importance and a judicious comparison of all the interests involved, with a view to balancing them against each other in conformity with the interests of society. For example, in this manner it would no doubt be possible to solve one of the most important problems in law, which in one form or the other is liable to arise in every lawsuit, the importance of which Jhering has emphasized a number of times, and regarding which our statutes are very nearly silent, to wit, the problem of stating which party has the burden of proof under the various legal conditions which may arise.

By the same method we may also, I believe, find the means of defining a doctrine which has hardly been more than touched upon by our court decisions, to wit: what constitutes an abuse of right, so as to make the party exercising it liable. Although the absolute formulas of the Roman law have come down to us, our modern legal conscience rebels more and more against the idea that the exercise of any right can be without limits. This tendency shows itself in a doctrine which finds

much favor to-day, refusing to apply the traditional maxim "Neminem laedit qui suo jure utitur" in all cases where a real abuse of a right is apparent. This doctrine, which has for a long time been upheld with regard to certain abuses growing out of the ownership of land and supplements in a measure the code provisions relating to the rights of adjoining owners, has in these latter days been invoked against certain manifestations of individual liberty which have required repression by private law because they encroached on the rights of others. It may readily be seen that the great difficulty with this theory, which taken by itself is not likely to be much disputed, is in the clear definition of what constitutes an abuse of right, exceeding its legitimate exercise to such an extent that it gives rise to a legal liability. May we take as the distinguishing characteristic of such an abuse, from a moral and psychological point of view, the intention of injuring another while apparently exercising a right? That would be nothing but a return to the much decried doctrine of "emulation" [some forms of unfair competition] and to the maxim which is so hard to apply: "Malitiis non est indulgendum." My personal opinion rather leads me to believe that the true and just limitations of individual rights will be discovered only by an examination of their economic and social object, and a comparison of the importance of this object with that of the interests opposed to it. However that may be, it suffices here to observe that this important question of the abuse of rights, regarding which our statutes are almost completely silent, can be solved in a judicious manner only by the balancing of all the ethical, political, social, and economic considerations which enter into the conflict of the interests involved.

§ 12. *The Same Subject Continued.* In order to express my ideas fully on this subject, I should say I am

convinced that greater and more certain progress will be made in the law by a frank method of investigation which will openly recognize the gaps in the written law. By this method we may then attempt to supply what the statute lacks by means of an independent scientific process, whereby all the surrounding circumstances will be examined and an equilibrium of all the interests involved be produced if possible. This will take the place of the subterfuge of forced constructions of the text, which is to be condemned not merely because it fails to understand the true nature of statute law and the proper rules for putting it into effect, but which must needs result in a falsifying of the ideas contained in the text and lead to unsatisfactory conclusions.

I may be permitted to make this matter still clearer by choosing as an illustration another extension of the traditional conception of civil liability for injuries. I have in mind what has been called the doctrine of objective liability, which has arisen in modern days from a laudable desire to give a fair compensation for certain accidents the cause of which is unknown, or for which no specific negligent act can be established.[13]

Josserand has reviewed and analyzed in his "De la Responsabilité du fait des choses inanimées" [14] the various theories on this subject which have been proposed prior to his own, with remarkable sureness and delicacy of touch. He has had little difficulty in proving that these theories have failed to bring about the desired results, although they have all done violence to the statutory texts on which they have been built; this has been the case without distinction, whether they involved

[13] It is well known that notwithstanding the statutes of April 9, 1898, and June 30, 1899, this is still an open question for all those injuries not coming within one of these statutes.

[14] 1897; pp. 11–52.

an extension of contractual liability, or whether they started from an amplification of the presumptions concerning negligence and thereby pushed the doctrine of liability for torts to an extreme point.

However, when we stop to consider the new conception of objective liability on statutory grounds from the same point of view, such as has been advocated by Saleilles since 1894, and further developed by the same author and Josserand, will we not unavoidably be driven to recognize that this ingenious theory has precisely the same fault as those gone before, in so far as it purports to be based on positive statutory provisions, so that the principle of employers' risk may be discovered, as has been said, in the Civil Code itself? Whether, with Josserand, we base it almost entirely on the empty and vague formula of section 1384 line 1 [A person is responsible . . . for the injuries caused by his own act], or are radical and bold enough to go with Saleilles to the first provision of the chapter and substitute for the conception of fault as expressed in section 1382 [Every human act whatsoever which causes injury to another makes the person through whose act the injury occurs liable for the damages] the simple relation of cause and effect, in either case we shall find it difficult to deny that we exceed the meaning actually expressed in the text, or twist the words of the legislator out of their natural meaning. Yet the principle so derived is still far from what the law should be, because with all the forced construction of the text the provision itself cannot be changed and the best rule that can be read into it is a liability for accidents caused by some piece of property belonging to the employer, while for all those originating without some material object over which the employer had control there is still no adequate and equitable provision.

I am far from wishing to oppose the just and reasonable idea which has inspired these new theories. I agree with that proposition altogether, I merely wish to point out the defects and shortcomings of certain mental processes by which it is attempted to establish it. Accordingly, I maintain that this legal principle could be more easily defended from the standpoint of safe reasoning, and would be more readily adaptable to the facts, if we were to admit frankly that the Civil Code in section 1382 and the next following sections provides only for injuries resulting from the fault of another, but that these provisions do not deal at all with inherent risks of the employment. The real question is to find out how the damages resulting from a pure accident can be divided among two or more persons who are all affected under the circumstances of the case; and we should say that in the absence of a statutory provision it is the office of the court to regulate the matter as appears best to promote justice and social utility.

In order to learn what will best promote justice and social utility, there is no way but to observe carefully what is the actually prevailing moral sentiment regarding such relations between man and man, and to inquire into the social and economic conditions so as to estimate the various interests involved at their true value in accordance with the state of our civilization as it exists at the time of rendering judgment.

Briefly put, we always come back to an attempt to establish an equilibrium between interests that are contending with each other or seem to be inconsistent. This result will never be obtained except by examining thoroughly the elements of every system of positive law, which, as I have shown in another place, are not logical entities, but those ethical and economic realities which alone can give us an insight into the effective forces of social life.

Moreover, as a general proposition at least, the rules so derived would give way to any inconsistent stipulation entered into by the autonomous will of the parties, because it must be held, â priori, that these understand better than anybody else, even the Government, what will best promote the interests which they are protecting for the benefit of all concerned.

§ 13. *The Principle of the Superior Interest of the Community.* In whatever way, however, we allow the principle of the autonomy of individual wills to assert itself, whether it supplements or contradicts a rule established by authority, under no circumstances can it be held to be without limits. Although primarily the exercise of individual wills may create a legal relation at the discretion of the parties interested, sometimes higher interests will intervene to set more or less narrow bounds to its power and to substitute officially a relation imposed by authority to one created freely and spontaneously. In other words, the satisfactory equilibrium of all the interests involved requires in such cases a compulsory standard which can brush aside the divergent fancies of the parties. This is at the bottom of what is commonly called the principle of public order. I shall have to agree that these two words are vague and ill-chosen to express the meaning to be conveyed thereby. Similarly, I confess that all attempts at defining "public order" in this sense, that is, definitions which attempt to discover a criterium outside of every concrete institution, by which one may discern at once the legal rules concealed in the provisions of private agreements, have failed completely. However, to conclude from this, as seems to be the idea of M. de Vareilles-Sommières, that we ought not to recognize a class of laws as being charged with a superior social interest, but rather to assert that no private person can derogate from the effectiveness

of any law, would in my opinion be a vain attempt to find a way out of the dilemma and amount to nothing more than to transpose the difficulty to another place. For it would seem certain that among the rights accorded to individuals by our system of law there are but a few which cannot be voluntarily renounced. It would not be a very difficult matter to determine what particular statutes giving such rights cannot be nullified by inconsistent private agreements, or rather, what are the rights given by statutes which one may not voluntarily surrender.

It would be purposeless, however, to change the customary way of stating the problem, unless the solution could thereby be made easier. The only things worth adopting among the criticisms that have lately been directed against the traditional conception of "public order" in its relations to private law are these: first, that, stating the matter negatively, there is no question here, no matter if the words used may make it appear so, of a set of interests really distinct from and separated, so to speak, by a watertight compartment, from what are properly private interests; furthermore, speaking affirmatively, the question resolves itself into finding out which rules, among those constituting the body of our private law, are those which on account of their nature and purpose cannot be set aside by a free regulation of the interests involved through acts based on the principle of the autonomy of the will; or what rules will at least restrain the exercise of the will of the parties sufficiently to prevent the sacrifice of superior interests by the will of private persons.

When it is put in this form, the question becomes of considerable importance. It has reference not merely to legal rules embodied in the written law, but just as much to every other legal rule that can possibly be

affected by the act of private parties, whether such rule arises under customary law or is the result of the free investigation of legal science. In fact the question enters into every law of such a nature that it may sometimes be subject to the will of the parties and sometimes rises superior thereto. In the case of rules that may properly be made statutory, it would seem to be the proper business of the legislator to indicate in his statute what effect he intends to give to it with regard to inconsistent private agreements. It will have to be said that few statutes contain any such clause, but that in most cases the construction of their provisions with regard to this point has been left to the discretion of the courts. It follows that we shall here find a vast field open to the independent investigations of legal scholars not only in connection with customary rules and principles based on scientific research, but even directly in connection with statutory provisions.

Such necessary investigations clearly cannot be carried on profitably except by questioning our moral nature, inquiring into the principles of the political organization under which we live, and studying the requirements of our economic environment so that we may learn thereby those superior rules which form, as one might say, the conditions under which modern society lives and which in consequence must necessarily be held superior to any mere private acts of will.

§ 14. *Other Applications of the Method of Free Decision.* Thus the courts are led, without exceeding the well-known limits of private law, whenever they have no formal guidance furnished by statute or established custom, to search for light among the social elements of every kind that are the living force behind the facts they deal with, if they wish to proceed with any assurance of being right.

The same thing would be even more evident if we were to study certain other problems that cannot be solved along the traditional lines and bring into play even more directly certain moral and economic interests which our written laws do but very little to balance against each other. Such problems may be found in connection with a great variety of subjects. Thus there are the rights inherent in the personality of the individual man and the consequences flowing therefrom, among which may be mentioned the rights of intellectual property. Then there is the problem of a special legal treatment of commercial rights and their proper distinction from ordinary civil transactions. Again, we may mention the question of the legitimacy and legal effects of understandings having for their purpose the regulation of industrial production; the very complex questions in mining law, growing out of the relations between the surface and the underground workings, and many other similar matters. These questions cannot all be solved, and our positive law regarding these subjects be settled, except by means of attentive observation of social facts and a reliance upon well-ascertained scientific data.

Here I must make an end of my observations. I believe that what has been said will suffice to show the fecundity and to explain the working of this necessary part of juridical method, which I have called "free decision on a scientific basis."

CHAPTER II

JUDICIAL FREEDOM OF DECISION: ITS PRINCIPLES AND OBJECTS

By Eugen Ehrlich[1]

I. Bureaucratic Law as Contrasted with People's Law

§ 1. RELATIONS OF LEGISLATOR AND JUDGE.—§ 2. INCREASED IMPORTANCE OF STATUTORY LAW.—§ 3. RULES OF DECISION INSUFFICIENT TO REGULATE ACTUAL LIFE.—§ 4. IMPORTANCE OF UNWRITTEN LAW.—§ 5. LAWYERS' LAW.—§ 6. DEVELOPMENT OF INTERNATIONAL LAW.—§ 7. GROWTH OF LAW WITHOUT LEGISLATION.—§ 8. LEGISLATION NOT A PRIMITIVE FORM OF LAW.—§ 9. THE COURTS AND THE STATUTES.—§ 10. MODERN CODES.—§ 11. INADEQUACY OF MERE STATUTORY LAW.

II. Statutory Law and Its Obstruction to Free Judicial Decision

§ 12. ADVANTAGES AND DISADVANTAGES OF CODIFICATION.—§ 13. LEGAL TECHNICALISM.—§ 14. FURTHER OBJECTIONS TO THE TECHNICAL METHOD.—§ 15. TENDENCIES OPPOSED TO TECHNICALISM.—§ 16. APPROXIMATION TO FREE DECISION.

[1] [Professor of Roman Law at the University of Czernowitz. This is a translation (omitting the first six pages) of his "Freie Rechtsfindung und freie Rechtswissenschaft," Leipzig, 1903. Another important work of the author in this field is "Grundlegung der Soziologie des Rechts," Munich, 1913. The translation is by *Ernest Bruncken*.]

III. CHARACTERISTICS OF THE PRINCIPLE OF FREE JUDICIAL DECISION

§ 17. FREE DECISION NOT ARBITRARY. — § 18. THE BASIS OF FREE DECISION. — § 19. LEGAL GROWTH AS AFFECTED BY THE LAWYERS. — § 20. THE PERSONALITY OF THE JUDGE.

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I. BUREAUCRATIC LAW AS CONTRASTED WITH PEOPLE'S LAW

§ 1. *Relations of Legislator and Judge.* Modern systematic legal science inclines to explain each rule of law principally by seeking to discover the intention of the legislator; but sufficient stress has never been laid on the fact that the significance of law in the daily life of a people depends far more on the persons charged with its administration than on the principles according to which it is administered. The same rule is likely to have an essentially different meaning in different countries or at different periods, for no other reason than that the persons sitting on the bench are differently trained, have a different temperament, hold a different official or social position. This is apt to be more vividly realized by the trained historian of law than by the analytical student. To the historian, the "praetor" and the "prudentes" still speak in the Pandects, the "Schöffen" in the old German law, and the judges of the Superior Courts with the Chancellor, in English common law and

equity grown out of the same Germanic root. Similarly, the law prevailing to-day on the European continent must be viewed as a system of law peculiar to a judiciary composed of learned bureaucratic judges. For while we may properly characterize the modern State as a State based on law, yet we must not forget that on our lips that term means, in essence, a bureaucratic State, although doubtless it is possible for a State to exist which is based on law and is not bureaucratic, as conversely one may conceive of a bureaucratic State that is not based on law.

We are all children of the bureaucratic State which has now dominated our political and social life for several centuries. Hardly one of us is likely, without great difficulty, to free himself from the conceptions and lines of thought generated and fostered thereby. In the eyes of a bureaucracy law is properly nothing but a body of directions given by the Government to its officials. To be sure, in its effects the law must apply also beyond the army of officials; for the very purpose of law is to regulate the conduct of the whole people that is subject to the government. At this truth, however, we are apt to arrive only in a roundabout manner; we reason that the people submit to the law because the Government officials compel them to do so, or would compel them if they dared to disobey.

§ 2. *Increased Importance of Statutory Law.* From the fact that modern judges are Government officials charged with the administration of the law, and from the conception of law as a command given by the Government to the judge, arises the supereminent importance now attributed to the written law among legal sources. For in a statute it is apparent, in a far more direct manner than in any other form of law, that the Government addresses a command to its officials. Whoever

inclines to conceive of law as a governmental command will find himself compelled to consider every rule of law more or less as if it were a statute.

As a matter of fact the prevailing theory regarding the sources of law does take that ground. It is true that the introductory sections of textbooks will assure us that customary law is of equal force with written law. Yet, if one looks at the actual practice rather than the verbal expression, one will soon come to the conclusion that treatises, manuals, essays, and decisions proceed from an assumption — never, of course, openly confessed — that there is really no law except statutory law. Those who have not grown up in a bureaucratic State, but have seen living customary law in actual practice, will find it difficult to understand the traditional lore about customary law, such as the doctrines of its "origin," its "presuppositions," the question whether a statute may prohibit the derivation of a rule from custom (although that is all the time supposed to be of the same binding force as the written law), or whether it may restrain such derivation by burdensome conditions. When these doctrines regarding the application of customary law were formulated, almost in the form in which they are taught now, by the jurists of the 17th and 18th centuries, the intention was merely to give to the bureaucratic judges a standard by which to determine the validity of customs derived from Germanic law, which were always looked at invidiously and which had to be pleaded and proven by the party. To-day such doctrines are obviously no longer in accordance with the times, and no doubt scientific reëxamination will put an end to them.

The essential nature of the bureaucratic State is expressed by the fact that for us the statute is the predominant form of law. Similarly, the content of the

law of the bureaucratic State depends on the essential character of that form of government. In essence, such a system of law is simply a rule of decision. Its exclusive or almost exclusive purpose is to direct officials how to deal with the matters intrusted to them, and particularly how to decide legal controversies. That is, of course, a very one-sided conception; for law as a rule of decision may indeed be the side of law most interesting to the lawyer, but it is by no means the only and not even the most important side. Law exists for other very different purposes in addition to the settlement of controversies. It is the very foundation of the social organism, or (to use an expression of Schäffle, already growing antiquated), law is the skeleton of the social body.

It is true that social arrangements do, in most cases, furnish the rules by which disputes growing out of such arrangement have to be decided; that, however, is manifestly but a subordinate, secondary function. The by-laws of an association may, under some circumstances, provide a useful basis for the settlement of a legal controversy; yet those by-laws serve, first of all, to regulate the work of the association. When the Austrian Civil Code provides that the husband shall be the head of the family, it defines correctly the organization of the family as it exists to-day; but it does not thereby furnish a rule of decision for controversies, and perhaps does not intend to give any. We all know that in Rome an "obligatio" could arise out of an agreement to do all sorts of things; yet, as long as the classical form of procedure continued, the judgment was always for the payment of a sum of money. The rule of decision did not correspond with the legal nature of the relation — "aliud erat in obligatione, aliud in solutione." Eck, in a well-known essay, explains how in Rome a

sale was a contract of transfer of title, exactly as to-day, although the rule of decision in the Roman law provided a liability merely on the ground of a license to take possession. The clearest case of a difference between a rule of decision and a rule of action is that of "obligatio naturalis"[2] — a duty actually arises out of it, yet its existence cannot be made the basis of a judgment for the payment of money.

§ 3. *Rules of Decision Insufficient to Regulate Actual Life.* No doubt it would be all wrong to assume (as the old school of Liberal politicians used to do) that law consists merely of rules of decision, and that the State has no business to organize society directly by means of law. Many modern agrarian institutions have arisen directly out of State activities; modern social legislation has already created enormous organizations; and above all, the State organizes itself by means of its military, governmental, and administrative institutions. Notwithstanding all that, the bulk of the law enacted by the State undoubtedly consists of rules of decision. Broadly speaking, the State can do nothing but issue commands to its officials, while the officials can do nothing but interfere when they are appealed to, and, as a rule, that is true even where they ought to act "ex officio." However, the attempt to change social life by means of rules of decision rarely accomplishes its purpose perfectly; generally speaking such means are inadequate to the ends. People go on just as before, even if once in a while a lawsuit is decided differently from what would have been the case under the former rule. If at the present moment a statute were to be passed giving the decisive authority in all family matters

[2] [An "obligatio naturalis," in the Roman law, is a liability void so far as the possibility of enforcing it goes, while it is still executory; yet, if it has been executed, it may become the basis of further legal consequences. — TRANSL.]

to the mother rather than to the father, the new law would probably have an effect only in the comparatively rare cases of judicial decisions relating to family affairs. The social organization of the family would probably not be at all changed thereby. Anybody who should assert that the broad foundations of social life, such as property, contract, family, succession, were established by such petty instrumentalities, or that their development was materially dependent on them, would be contending against the plainest evidence.

§ 4. *The Importance of Unwritten Law.* But, even of rules of decision, the smallest part is the result of State action. Every sort of protection of rights by the State begins with enforcing the payment of compensatory damages, which in primitive times the injured party sought to recover on his own authority and by his own power. At the moment when the judgment of a court is substituted for this primitive self-help, there are no rules of decision in existence except those flowing from the very nature of the social organization. In other words, they are derived from such sources as the nature of property in the form it assumed directly under the conditions of primitive ownership; also from the nature of those associations which are of so much importance in primitive society, like the clan, the family, the community, the guild; from the customary subject-matters and forms of the most ancient contracts, and the primitive forms of intercourse, which are mostly older than any sort of legal protection. Decisions are first preserved by oral tradition, then written down, collected, commented upon, generalized, and at last codified. Thus arise those peculiar systems of law in the special keeping of lawyers, which are, in many different forms, characteristic of the early times of all the nations of the world. They are legal science and legal rule all in one, like the

old "jus civile" of the Romans which still lives, unchanged in essentials, in the writings of the classical Roman jurists and the great compilation of Justinian.

The decisions, therefore, are not based on the rules of law, but the rules of law are deduced from the decisions. The law on which the decisions are based is the "jus quod est." Paulus, who could still observe the actual working of a living law of this kind, puts what he has learned in actual experience tersely into the famous maxim: "Non ex regulâ jus sumatur, sed ex jure quod est regula fit." The decisions are older than the rules, — the law of the lawyers older and incomparably richer than the law of legislatures.

§ 5. *Lawyers' Law.* It is well enough to call such lawyers' law [3] "customary law," as is done in the books; only, one should not forget that this expression covers several very different things. The lawyers' law of commerce is almost entirely the custom of merchants. The lawyers' law of damages and procedure arises from the gradual mitigation of arbitrary self-help, especially after the custom of calling on the judge to settle quarrels has become obligatory. The lawyers' law of primitive associations, both local ones like the commune, and social ones like clan and family, is based on primitive social inclinations of mankind; with these, all such associations appear, and when they decay the associations also fall into irremediable decline. From such tendencies also the law of succession takes its origin almost entirely. In the lawyers' law growing out of the distribution of property can be found the rigid expression of social relations of power; for upon these depends the regulation of such matters as the services to be rendered by the

[3] [The word "Juristenrecht," used in the original text, comprises first of all those Roman law rules based on the "auctoritas prudentium"; next also any law developed by a special class of lawyers, like the common law as found in the decisions of our courts. — TRANSL.]

villein to the lord of the manor, or the question whether after the decease of the feoffee the land shall return to the feoffor or go to the heirs of the feoffee's body.

It is clear that lawyers' law could not, indeed, create social institutions, but it could delimit them firmly and give them a theoretical definition. It could do this especially where, as among the Romans, it had a direct effect upon actual life by means of the practice of following the opinions of consulting lawyers. Nobody is likely to imagine that the lawyers could have established, for example, a legal institution like usufruct (or life estate in land); but it was they who made the form of usufruct in Rome serviceable for that purpose, and it was also their business to find a rule for the division of profits between the owner and the beneficiary. In all such cases the rules of decision are derived from the nature of the social institutions and processes with which the lawyers had to deal, and in the same way the practice of the lawyers adapts itself to the tendencies already noticeable in business and, so to speak, formulates the wishes of business men.

§ 6. *Development of International Law.* We may now call attention to a similar course of development which perhaps is shaping itself before our very eyes. It is not entirely improbable that in the course of time a judicial power and a system of administering law may grow up, to which the disputes between States may be subject in the same sense in which to-day contentions between private persons are subject to the judicial power of the States. The rules of law according to which such an administration of justice would be carried on could not possibly, at first, be anything but a lawyers' law derived from the nature of the State and the existing customs of international legal relations. Zitelmann, in his "Private International Law," shows what

a multitude of rules that might also serve to decide public international disputes could be derived simply from the principles of local and personal jurisdiction. Surely this process, which is easily conceivable by a modern lawyer, represents very clearly what has already occurred once before, when judicial remedies were substituted for self-administered justice. These judicial remedies were based upon a system of lawyers' law derived from the nature of the disputes submitted to the courts and from the existing customs of human intercourse. If, accordingly, someone were to assert that the various States owed their origin or continued existence to the protection they received from this species of lawyers' law as administered in the international courts, he would be about as near to the truth as those who, at the present time, assume that the law of property, family, contract, or succession is in some manner founded on the protection given to it by the State by means of the rules of decision established by it.

§ 7. *Growth of Law without Legislation.* For the same reason, the rules of decision already in existence are necessarily in a continuous state of change, simply on account of social evolution. This can be observed most clearly in the case of the adopted Roman law. For what was adopted was not, of course, the legal relations existing among the Romans, but merely the Roman rules of decisions, and, among these (as already stated), almost exclusively those belonging to the body of lawyers' law. Now we find ourselves confronted by this remarkable situation, that the Roman rules of decision are filled with an entirely new content by the modern, native legal relations to which they are applied.

Looking at it superficially, one might think that the Roman law of debtor and creditor was adopted almost completely. Yet, in the case of a Roman "obligatio,"

creditor and debtor were not individuals but groups of individuals, legally represented by the "paterfamilias," who alone could do a legal act.[4] Obviously, the fact that to-day this relation is not one between groups of people but between individuals is a difference so fundamental that as against this all similarities in detail must disappear. Again, almost before our eyes, the matrimonial relation is turning from a relation of dominion of a man over a woman into an association of two individuals of equal importance and equal rights; the paternal authority and the authority of a guardian are becoming a public office instead of a private, profitable right.

Transformations of this sort, pregnant with immeasurable consequences, are likely to be at work every moment in affecting legal and social judgments concerning legal relations; yet it might not be necessary on that account to change a single line of the written law. Many a thing is to-day considered a bitter wrong done to a matrimonial partner, or a breach of faith toward a ward, which perhaps as late as the first half of the 18th or the first third of the 19th century nobody would have considered wrong. The most tremendous and irresistible legal revolutions are going on in the social institutions themselves and transform radically the rules of decision of the lawyers' law, sometimes without so much as entering into the consciousness of the parties or even of the lawyers themselves.

§ 8. *Legislation Not a Primitive Form of Law.* The formulated law proceeding from the government is essentially different from the lawyers' law. The statutes,

[4] To this group of individuals belonged not only the members of the family, but also the slaves and, in the more ancient time, apparently also the freedmen, even although these were capable of having legal rights and doing legal acts. Comp. *Cicero*, "Epistula ad Quintum," I, 1, 13: "libertis quibus illi (maiores) non multo secus ac servis imperabant."

as a type, are much newer than customary law or lawyers' law, and are probably everywhere a relatively late phenomenon. In antiquity, it seems to have become well established among Romans and Athenians only, although in the other Greek States there existed considerable beginnings toward it. The earlier Middle Ages likewise proceeded hardly beyond attempts and transitions. Administrative ordinances and provisions relating to peace and war or public works are, of course, not properly counted among statutes, even when they are adopted by the assembly of the people. The "codes" of Hammurabi, Moses, Manu, Zarathustra, of the legendary Minos and Lycurgus, the Roman "leges regiae" and Twelve Tables, the Germanic "leges barbarorum," the Koran,— all these amount merely to the recording and editing of existing ceremonial, ethical, and religious rules, and rules of customary law. Sometimes they were mere private records, sometimes they were made under the authority of priests or rulers; sometimes, even, they were edited rather freely and contain extensive changes; and at a later period ordinances were added abrogating or amending objectionable or obsolete legal customs. These begin to approximate closely to statutes. But a statute proper as regards subject-matter, that is, an abstract rule, directing the people how to act in the future, presupposes a decidedly advanced conception of the functions of the State, as well as governmental agents ready and capable of enforcing such a rule, and some comprehension of the purpose of the law among the broad masses of the people. An oriental despot may be able by a nod to raze a city, but he cannot prescribe to his subjects the form of the contracts they make among themselves.

§ 9. *The Courts and the Statutes.* Evidently the relation of the judge toward the statutory law is quite

different from his relation toward the lawyers' law. The statute gives him commands, the lawyers' law offers instruction. Lawyers' law derives its force from its foundation in a just judgment regarding existing relations, while the statute derives it from the power of the government. Courts receive commands from the legislative power having authority over them, but acquire information wherever they find it. English courts cite unhesitatingly American decisions, American courts cite English ones—but to base a judgment on a foreign statute would be utterly out of the question.[5] In the same manner the Roman lawyers' law has been utilized wherever it was taken simply as "written reason," as in Scotland, to some extent in the Low Countries and in France, and even in Germany until the rise of the learned judiciary.

But modern bureaucratic judges, as was shown above, have lost, in consequence of their official position and their whole legal training, all pyschological capacity to find in a legal rule anything but a command. Thus the development of a learned governmental judiciary brought about a tendency to treat lawyers' law as if it were of the same nature as statutory law. In this manner what originally was merely instruction was raised to the rank of a command.

§ 10. *Modern Codes.* The turning of lawyers' law into written law found its consummation in the modern civil codes. Like the Corpus Juris, these are for the most part codifications of the lawyers' law, but statutory provisions proper are also to be found in them. Externally, the lawyers' law is here entirely assimilated to the written law; and this fact has already entered so

[5] Where foreign statutes are cited as authorities, as is done frequently for instance, by Swiss courts with regard to German statutes, the foreign law is treated not as a statute but as "written reason," just as the opinions of an author might be cited.

deeply into the legal consciousness of the people and the modes of thinking of the lawyers, that even those will have to reckon with it who do not overlook the internal differences on account of the external assimilation.

After all, lawyers' law remains lawyers' law even when it is put into sections and adopted by a representative assembly; the distinctive character of this source of law will continue to produce its effects below the surface. Yet it is apparent on all sides that this intrinsic difference finds no sort of outward recognition. Even the fictions and constructive assumptions of the civil law are in force as if they were in the nature of real statutes. It is assuredly very doubtful whether there ever have been, in Germany, servitudes in the Roman sense; yet the whole civil law relating to servitudes, taken as it was from Roman conditions, had as a matter of course to be applied to those legal relations which in the German civil law were treated as analogous to Roman servitudes, even to such an extent that one had to sue by a form of action like the Roman "actio confessoria."

§ 11. *Inadequacy of Mere Statutory Law.* This process, resulting finally in the practical elimination of customary law and the turning of lawyers' law into statutes, has given to the external form of modern law a rigid immobility which apparently renders impossible all development except by means of legislation. That form corresponds very well to the spirit of the prevailing scientific doctrine, and sometimes it is actually advocated in so many words as the true principle. Yet, notwithstanding all this, that formal rigidity has always been much more apparent than real. The reason for this is by no means lack of intention to make it real, but rather the existence of certain truths which, like all truths, cannot be kept from asserting themselves

No theory of the application of law can get around the difficulty that every body of formulated rules is in its very nature incomplete; that it is really antiquated the very moment it has been formulated. Consequently, it can hardly govern the present and never the future. No such theory will ever be able to prevent the perpetual course of evolution of the social institutions to which the law is applied, whereby the formulated rules of decision are constantly obliged to deal with new subject-matters. And it will also never be possible to avoid the fact that the individuals intrusted with the application of the law, being children of their nation and their age, will apply the law in the spirit of their nation and their age, and not in the spirit of past centuries, according to the "intention of the legislator." The most solid theories and the most powerful legislation must alike be shattered upon the rock of such realities.

II. Statutory Law and its Obstructions to Free Judicial Decision

§ 12. *Advantages and Disadvantages of Codification.* The codification of the law actually in force becomes a necessity after the body of lawyers' law has increased beyond a certain point. Notwithstanding some undeniable drawbacks, such codification seems to be advantageous on the whole. By summing up the entire course of legal development to date, it creates some sort of order out of the chaos of the law, — which in the course of time tends to become an impenetrable wilderness even to the most skillful.

It is true that the international interaction of legal scientific labor is thereby rendered impossible, — such an influence as existed doubtless during the flowering period of the common law, when Germany, Holland, France, and Italy formed a single province from a

literary as well as a legal point of view. For even so late a treatise as that of Savigny, in the early 1800s, was founded on the idea of a science of the civil law unhampered by national boundaries. Nevertheless, codification creates a single, firm basis for legal development and legal science within a nation. And it may be hoped that in the course of time this may break through its national limitations and become transformed into a general, comparative science of law, at least in the sense in which the work of the analytical school of Austin and Holland constitutes such a general science of law.

Even in regard to the common law, however, it would have been worth doubting whether it was necessary or proper to go to the Corpus Juris for rules relating to legal institutions or legal problems about which the common law is silent (especially those originating subsequent to the Reception), and for that purpose to dabble in fictions and logical generalizations modeled after those of the common law, while rejecting the right of free judicial decision on principle. Now after the common law has everywhere been supplanted by codes, that question assumes a double importance. Are we to renounce all free judicial decision regarding these also? Is it to be our destiny for all future time to try to regulate life by fictions and logical generalizations?

Government-formulated law signifies invariably a demand made by the State upon Society. It means that social development is to be subjected to the ends of the State. Therefore it is necessary, in order to justify the compulsion which the statute exerts upon social evolution, to show that such compulsion is absolutely unavoidable for the higher purposes of the State. Consequently, it is a fair question to ask whether the codification of the law may not be objectionable on this

ground alone, viz., that it enforces on human life the will of the State in a thousand instances, although frequently the State is not interested in the least that such should be the case. What we are here concerned about, however, is not merely restraint by statute, but restraint by a technical judicial method, which applies the statute to cases for which it contains no express directions.

§ 13. *Legal Technicalism.* It is certain that one need not expect better or juster results from such technical decisions than from free ones. Generally speaking, it is undoubtedly much easier to decide a definite case correctly than to establish an abstract rule universally applicable for all imaginable cases; and surely it can hardly be maintained seriously that such a rule will invariably result in the fairest decision, even in those cases which nobody had thought of when the rule was made. As a matter of fact no such thing is attempted by the technical judicial method of decision; its goal is quite different. A rule is to be framed, not necessarily always just, but at least certain, that can be ascertained in advance and will afford protection against arbitrary and biased judgments. In order to attain this end, the judge is to be subjected, bound hand and foot, to a rule that determines all things in advance.

If an inference may be drawn from the experience of four centuries during which this legal technicalism held undisputed sway, it would seem that this goal has never been reached, and that it can never be attained. In the countries where the technical method prevails, the decisions are no more certain, even by a hair's breadth, and the courts not a whit less arbitrary, than under the "jus civile" of the Romans or under the common law of Englishmen and Americans. Even the most ordinary interpretation of a statute, consisting in the discovery of the legislative intent, gives rise to so many doubts

that a man who wanted to misapply the law would have to be peculiarly inept in order to find the paper fence of the statute an obstacle. Really, no possible harm could be done if we renounced once for all our attempts at making the law certain and guaranteeing its unbiased administration by means of fictions and rules of construction.

If the prevailing doctrine were really meant seriously, it would be necessary to overrule every motion of a party, whether the motion of plaintiff for leave to bring suit, or the motion of a defendant for leave to interpose a demurrer, a motion in the course of an action or a motion in an "ex parte" proceeding, unless an express provision could be shown in the statute directing the court to grant the motion. Such is said to have been the rule in Rome, according to the account given by Gaius (though quite unreliable), in the days when "legis actiones" were in vogue. Then every action had to abate that was not founded on a specific "lex." Not one of the modern codes takes this position. All of them admit at least analogies and rules of construction. According to these, it suffices if by the statute a similar motion would have to be granted, or even if the claim could be made to appear by construction to be in harmony with the law as declared. The prevailing doctrine justifies the application of a statute in cases which the legislator obviously never had in mind, by saying that the legislator, *if* he had thought of them, would have treated them as he treated similar cases, or as he treated those cases which serve as starting points for the work of logical construction.

Every analogy, however, and every rule of construction implies (to use the expression of Gustav Rümelin) a "value judgment"; the implied assertion is always that by means of the analogy or the rule of construction

a fair result may be obtained. No doubt that is correct, for otherwise one could hardly maintain that the legislator would have decided in the same way if he had thought of such cases. But if that is really the case, then the technical method of decision also leaves so much to the discretion of the judge that it affords practically no advantage at all over freedom of decision.

§ 14. *Further Objections to the Technical Method.* But how about the possibility of foreseeing what the decision of the court will be? In what cases is such foresight actually attained under the technical method? Apparently in those few cases only in which the law is so clear and definite that there is really no need of searching for it. In cases of this sort, however, the method of free decision would make no change, for it would come into play merely when there is no clear provision in the formulated law. There is good reason to claim that a better guaranty for certainty of the law than by the technical method may be found in a method of free decision — bound only by judicial precedents, but not beyond that. Even to-day, a judge feels greater assurance when he can refer to a series of adjudications than when he has nothing but a construction of the statute which may at any time be upset by some other artist in construction.

On still another ground, however, one may venture to call the method of legal technicalism nothing less than the sin against the Holy Spirit. For this method has obscured our eyes to the only true principle at the foundation not merely of a certain and unbiased administration of justice, but also of a justice dominated by great ideals: *There is no guaranty of justice except the personality of the judge.* By making legislation the center of our system of law, and by nothing else, has it been possible to hide for so long a period the recognition

of the simple truth that the greatest task that can be given a man to discharge, Justice, requires a standard of mental and moral greatness far above the common average. Thus, and thus only, can people fail to see that for such a task a man is not fit merely because by examination and a little practice he has proved that he can, after a fashion, find his way through the sections of a code.

Even mistakes have a logic of their own. When the code sections were made the guardians, so to speak, of legal certainty, other guardians had to be installed to see that the guardians did their duty. Thus came about the system of appellate courts, one above the other, and the baleful practice of having courts of plural judges, in which the several judicial individualities either neutralize each other or vanish in mere corporate responsibility. Such was the origin of the modern impersonal courts of the European continent, which are radically different from those of the Romans, and also from those of the English, among whom the first men of the nation count it the greatest of honors to be called upon the bench.[6] Anybody who realizes how with us an unproductive dialectical smartness is considered the highest proof of legal skill can hardly understand why the Romans had such a high regard for legal learning, and why they should describe it as "vera philosophia" and "divinarum atque humanarum rerum notitia."

§ 15. *Tendencies Opposed to Technicalism.* And yet it is no compelling rule of law that has degraded the modern judge to his present position. It is true that the technical method of legal science dominates the application of the law; but like every other scientific

[6] It should be remembered that the office which in Rome is analogous to the English judge, is that of the consulting jurist delivering "responsa." It is true, however, that in England also the system of appeals and of judicial benches has taken root, although partly in a different fashion.

doctrine it is bound to give way at any time before a better understanding of the truth. There was indeed a vigorous countercurrent noticeable in the scientific treatment of the law as early as the 17th century. The doctrine of the Law of Nature, which ruled the minds of lawyers throughout the 18th century, and has really never disappeared altogether, can, in part, be explained in no way but as a reaction against the technical method. In England, the classical country of free judicial decision, it has always been hard to understand what all this "Law of Nature" meant.[7]

The teachers of the Law of Nature raised the question, quite seriously, which law was entitled to precedence where the law enacted by the State and the Law of Nature were in conflict. There were few who would have doubted that the judge was bound to decide according to the Law of Nature wherever the written law failed him. The doctrine of the Law of Nature, as such, has lost its power over the minds of lawyers, yet its seed has borne fruit, and German legal science, in many respects, is still unconsciously imbued with its spirit. This is true, in particular, with reference to the doctrine of the non-compulsory effect of statutes. The rule that the written law cannot determine questions peculiarly within the province of scientific expert knowledge has beyond a doubt won back for the cause of free decision a good part of the lawyers' law. Among such non-compulsory parts of statutes are classed especially (in the opinion of many) provisions regarding the theory of the sources of law, and the method of applying the law. Both these subjects must therefore be left to free scientific discussion. Similarly, according to the

[7] *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," p. 331; *Bryce*, "Studies in History and Jurisprudence," vol. 2, p. 177. *Holland*, "Elements of Jurisprudence," 8th ed., p. viii, calls the German Law of Nature "jurisprudence in the air."

accepted view, definitions in a statute are in no way binding upon legal science, at least as regards private law.[8]

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Let us here quote the following from the official notes to article 1 of the preliminary draft of the new Swiss Civil Code.[9] " . . . During a period not altogether passed away, people were influenced by the illusion that the court would always and in all cases apply the formulated law, if not according to the letter, according to its meaning and spirit. Yet this assumption is, in many cases, not verified. The proposal to recognize the real condition of things, as made in this draft, is likely to meet with the objection that the judge would thereby become too independent. He will, indeed, be *more* independent than he is now in those places where he is expected to derive absolutely everything from the statute, even if by the most questionable tricks of interpretation. But it shows a higher conception of his office not to expect of him such performances. He should have the right to recognize that there are in the statute 'lacunae' which cannot be filled by construction. After he has determined that fact he will render his decision, not on the assumption that the statute covers everything, but that the whole body of the law is sufficient for all cases, and will presume the existence of such rule as he would consider

[8] [A number of paragraphs here omitted deal with special provisions in the Codes of France, Germany, and Switzerland. — TRANSL.]

[9] [The text of this article is as follows:

"The Civil Code applies to all cases for which it contains provisions, either according to its letter or its spirit.

"If the Code contains no provision applicable to the question at issue, the judge shall decide according to customary law, and where that is also absent, according to recognized legal doctrine and science.

"In the absence of all these sources, he shall render judgment in accordance with such rules as he would enact if he were the legislator." — TRANSL.]

proper in reference to the whole body of the law if he were legislator."

§ 16. *Approximation to Free Decision.* These admirable words describe exhaustively the task devolving upon the judge under the principle of freedom of decision. Notice the further statement that "Such is in reality the practice even now." This refers, to be sure, to the special character of the administration of law in Switzerland, where the adoption of the Roman law and the bureaucratization of the bench was never carried out completely. But the practice elsewhere is not different. It is significant, however, that judicial decisions are rarely based upon analogy or on the spirit of the statute. These are regarded as being so indefinite that thereby the door would be opened wide to freedom of decision. It seems as if the courts were actually afraid of their unaccustomed freedom. Far more frequently the decisions employ certain undefined and undefinable conceptions which have been adopted by legal writers and lawmakers, sometimes avowedly and more often unconsciously, for the purpose of affording an opportunity for freedom of decision, for example, such terms as "the nature of the subject-matter," "implied intent," "good faith," or the "custom of the trade."

No other court, sitting in a jurisdiction where the technical method prevails, has succeeded in acquiring so much freedom as the Court of Cassation at Paris. To this circumstance we owe some of the most fruitful juridical ideas of the age. Among these must be counted liability for accident and the negligence of a stranger, the rules against unfair competition, the development of copyright, and the law of insurance. By the decisions of the Paris Court of Cassation so many new ideas have been infused into French civil law, statutes have been

interpreted so frequently in a manner deviating widely from the intention of the legislator, that one may properly say: Whoever knows merely the statutory law of France has no conception of the law as it actually there exists. In Germany the former Hanseatic Supreme Court of Appeals at Lübeck, the Appellate Court of Commerce at Nuremberg, and subsequently the Imperial Supreme Court of Commerce (and the Imperial Court itself, at least in commercial cases, in which the courts have always been allowed to exercise a degree of freedom), have proven that German courts are also capable of elevated thought and creative ideas if they are allowed free play.

The Austrian Supreme Court has a way of adhering to the words of the statute with scrupulous meticulosity, and rarely with beneficial results. Granting that its decisions have many excellent characteristics in other respects, yet it has become manifest that a preference for strict interpretation does not even assure the advantage of certainty. Words are extremely imperfect tools, and nobody has ever succeeded in mastering real things by means of mere words.

How has it been possible, notwithstanding the many influences pushing in the direction of technical decision, that the administration of the law has so often been able to throw off its fetters?

For one thing, law is not a rigid dogma, but a living power. The mere fact that a statute has been adopted does not prove that it is in force, and from the intention of the legislator you can by no means infer how it may work out. The various civil codes consist in part of statutes proper, in part of codified lawyers' law. But no matter how nearly alike you may make the two externally, you will never succeed, for example, in giving the same force to the rule relating to the

retroactive power of performed conditions as to the prohibition of usurious contracts. Lawyers' law, if for no reason but that the State as such has no particular interest in its subject-matter, is always in essence an instruction imparted by "written reason," rather than a command. But even a statute proper is really effective only by its indwelling force. If it cannot overcome the resistance of the environment it loses its vigor, is applied erroneously, or grows absolute. There is some consolation in the idea that the administration of law sometimes attains simple justice in a roundabout way when a statute blocks the straight road. At the same time it is not the business of legislation to compel it to take the roundabout road.

III. Characteristics of the Principle of Free Judicial Decision

§ 17. *Free Decision Not Arbitrary.* A modern judge who assumes it to be his duty always to base his decisions on an express statute naturally will ask what is to serve as foundation for the administration of justice if that of a statute is to be withdrawn.

One might be tempted to reply simply that in every period of time there has existed a justice not hedged about by code sections. Such justice, however, is by no means arbitrary. As already emphasized at the opening of this essay, it grows out of the principles of juridical tradition. Every kind of freedom of decision starts with juridical tradition and tends toward what Stammler has called "correct law" ("Richtiges Recht"). The very peculiarity of the judicial office is the assumption that the judge's utterance represents, not his personal opinion, but the law. And this law is found primarily in the legal records of the past, in statutes, in decisions of courts, in legal literature. No Roman

jurist ever deviated farther from the traditional rules than he was compelled to do by necessity. Blackstone, in a famous passage of his Commentaries, speaking of the English common law, represents the English judge as only declaring, not as making, the rules of law.[10] Free decision is conservative, as every kind of freedom is; for freedom means responsibility, while restraint shifts responsibility upon other shoulders.

§ 18. *The Basis of Free Decision.* No rule is just for all times. Every form of justice, like all formulated law, is the outcome of historical development. We have already pointed out that lawyers' law, the child of free decision, is composed of rules derived from the nature of social relations and changing as these change. The great mass of rules of decision are determined, at any given time, by the changing social conditions to which they are applied. Stammler seems to have found the right way of putting it; he refers to the story of Herodotus concerning the Medes, who, after their separation from the Assyrians, living without statutes, elected Dejoces their King, because in their contentions he had proven himself a just judge; then he adds: "The skillful judge whose decisions delighted the people, had understood well how to adjudicate newly arising issues on the basis of principles derived from traditional customs. For we may safely assume that there also such things existed as property, binding contracts, family authority, individual right of inheritance, etc., and that the question was how to maintain these principles in each particular controversy. It would be idle to imagine that he administered his function of arbitrator without any such basis of positive institutions."

§ 19. *Legal Growth as Affected by the Lawyers.* Long ago von Bülow proved convincingly that all *declaration*

[10] Blackstone's Commentaries (Cooley, 3d ed.), p. 69.

of the law, even if it aims to be simply *application* of law, is by its very nature creative. Every species of legal science, consciously or unconsciously, tends to progress through the formulated law beyond the formulated law. The difference between free decision and technical decision is therefore not so much that the former may go beyond the statute, but lies rather in the manner of doing so. For the technical method requires that its work of art be achieved only by means of certain devices of legal thinking from which no variation must be permitted; while free decision *counts also upon the element of creative thought by great individual minds.*

One sees that the technical method is a child of the same spirit as the system of a collegiate judiciary, and the multiplicity of appeals. All these devices are intended to eliminate as far as possible the personality of the judge. That aim, however, will forever be futile. For each application of a general rule to a particular case is necessarily influenced by the personality of the judge who makes it. Legal tradition itself, while a result of social processes, is at the same time the work of the men who labor at it. Similarly, this tradition is constantly being newly shaped and remodeled by those who continue such labors. No doubt the Roman law would show quite a different aspect if, for so much of it as has come down to us, not Ulpian and Paulus but Javolenus and Celsus had been the spokesmen. In the common law of to-day, no matter how completely it may be dominated by the technical method, everybody with the requisite knowledge can accurately distinguish the component parts which as late as the 19th century have been introduced into the edifice by such great builders as Savigny, Puchta, Arndts, Vangerow, Bähr, Jhering, Windscheid, and Bekker.

§ 20. *The Personality of the Judge.* Thus the administration of justice has always contained a personal element. In all ages, social, political and cultural movements have necessarily exerted an influence upon it; but whether any individual jurist yields more or less to such influences, whether he is more inclined in his "quae traditae sunt perseverare" or rather "ingenii qualitate et fiduciâ doctrinae plurima innovare constituit," depends of course less on any theory of legal method than on his own personal temperament. The point is that this fact should not be tolerated as something unavoidable, but should be gladly welcomed. For the one important desideratum is that his personality must be great enough to be properly intrusted with such functions. The principle of free decision is really not concerned with the substance of the law, but with the proper selection of judges; in other words, it is the problem of how to organize the judiciary so as to give plenty of scope to strong personalities. Everything depends upon that. Until there is a change in that regard, all legal provisions will remain as ineffective as section 7 of the Austrian Civil Code.[11]

It is fair to doubt, we must admit, whether the usual course of promotion within the bureaucracy is the best means of making the administration of justice proceed on grand lines. It is significant that the Paris Court of Cassation, the only court on the European continent that regularly exercises the power of free decision (in fact though not in name), has attained this goal as

[11] [The section of the Austrian Civil Code referred to reads: Section 7. "Where the case cannot be decided either according to the literal text or the natural meaning of a statute, regard shall be had to analogous provisions clearly contained in the statutes, and to the principles applying to provisions regarding similar matters. If the case is still doubtful, it shall be decided after carefully collecting and considering all surrounding circumstances, according to the principles of natural justice." — TRANSL.]

successor to the French Court of Parliament, of which it has been said that "though its members bought their places with money, yet it gave to France the best judges she has ever had." It is significant also that in Germany the only courts which sometimes have an opportunity for free decision are the Courts of Commerce, which to some extent are placed outside of the regular bureaucratic hierarchy, or at least formerly were so placed. Assuredly these institutions are no proper models. Examples should rather be sought in Rome or in England, where the courts gather into their membership the intellectual and social flower of the nation and where the most eminent men consider a seat on the bench the highest goal and the most dignified completion of their life's work. The names of the great English judges, such as Lord Mansfield, Lord Eldon, Lord Bowen, or Sir George Jessel, are better known in England than almost any famous jurist is known on the Continent. No doubt it has happened more than once on the Continent that men of that caliber have been raised to the bench, but nobody knows of them outside a narrow circle of the initiated, and their fame does not survive their own group of associates.[12]

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It would be unfair if we failed to recognize that there are further and perhaps better-founded reasons for the existing antipathy to free legal decision. One such reason may be found especially in traditional conceptions regarding the proper limits of the functions of Government and the separation of powers. In the tendency to make the bureaucratic judge base his judicial opinion invariably on the letter of the statute we may find a good portion of the old-fashioned Liberal

[12] [Some omitted paragraphs deal with special conditions in civil law countries. — TRANSL.]

distrust of the Government; and on the other hand it will take a long time before the idea will be thoroughly familiar that the function of legislation does not extend to every form of lawmaking but is confined to the passing of express statutes. Those ways of thinking, however, really belong to a theory of the State which is already antiquated, although like every political theory it was the scientific expression of conditions historically developed.

IV. The Tasks Awaiting Freedom of Judicial Decision

§ 21. *The Work of Legal Science.* We may now cast a glance at the science of law, and consider what tasks will remain for it after technicalism has been supplanted by free decision.

First of all, it becomes plain that after this change there can be no further place for the traditional essay on rules of construction. The moment it is recognized that a statute provides only for what it provides, and that what is not so provided simply remains unprovided, there can be no further excuse for using a hairsplitting machine, — or as it were, for squeezing decisions out of a statute with a hydraulic press. Many tears will not be shed over the decease of that misshapen bantling of our "reception" of Roman law.[13] Anybody can see that the basis of a decision ought to be that it is just, or that it is equitable, or that it is in accordance with the statute or legal tradition. Let us hope, however, that we may be approaching a time when nobody will be able to understand why a decision should be rendered for no reason than that somebody has written a book in which he *construed the law to mean* what the

[13] "[Rezeption" or "reception" refers to the adoption of the civil law, or Roman law as modified by mediaeval jurists in Germany and other countries of the Continent. — TRANSL.]

decision says it means. To be sure, a great deal of respectable mental power has been expended upon these essays of the traditional kind — but for what purpose? In Macaulay's phrase, one may move one's legs in the treadmill as well as on the high road; but on the road they carry us forward, while in the treadmill we remain in the same place.

It is useless to inquire what roads legal science shall travel after it has turned its back on fruitless labors. The human mind is inexhaustible, and the number of unsolved problems in every field is infinite. It would be arrogance to play the prophet in such matters. But, in view of the amount of energy that is wasted in treadmills of various kinds, one may be permitted to call attention to several attractive landscapes which may be reached by commodious highways.

§ 22. *The Practical Operation of the Law.* Certain it is, first of all, that the primary task of legal science, to inquire into the meaning of legal rules, will retain its rank. Modern civil codes require scientific interpretation more urgently than any other species of formulated law. They are themselves the result of legal science, and are capable to a much higher degree than ordinary legislation of being perfected, and developed by jurisprudence.

The discovery of the hidden meaning of formulated or unformulated law, however, is by no means the whole of the task. *A legal rule must be treated not like a rigid dogma but like living energy.* After one has found the meaning of a legal provision, obviously he still has to show how it works. That, however, does not depend on its interpretation, but on its inherent force, the nature of the society for which it was made, and the character of those who apply it. It is the business of legal science to teach the law as it actually works.

Whoever knows but the "intent of the legislator" is still far from knowing the law that is really in effect.

In this sense the traditional, dogmatic conception of law may be contrasted with a dynamic conception. For the latter, the problem is not simply to know what a rule means, but how it lives and works, how it adapts itself to the different relations of life, how it is being circumvented and how it succeeds in frustrating circumvention. Whoever assumes, as is done so commonly by the traditional school as a matter of course, that the law works out precisely as the legislator intended, ignores the long distance separating the instrument from the performance and the performance from its consequences in all human affairs. Heretofore the historians of the law have been almost alone in inquiring how the law actually works; occasionally economists and specialists in commercial law have also done so, but to the systematic student of the law such questions have unfortunately, for the most part, seemed outside of his proper sphere.[14]

Here we must turn first to the decisions of the courts. From these principally we may learn the "jus quod est," from them alone we can gather what rules of decision have actually entered into daily life, and how they have done so. But it is not enough to cite decisions in a text, or in notes, and to approve or condemn them according as they are deemed correct or otherwise. A legal decision is always the result of a number of factors influencing the judge; meaning and text of a rule is one of these factors, but not the only one. Every decision expresses some actually existing social movement; even

[14] In my work "Das zwingende Recht und nichtzwingende Recht im bürgerlichen Gesetzbuch für das Deutsche Reich" I have tried to treat the German Civil Code in that manner. This, however, is particularly difficult in regard to a system of law still in course of development.

the most abstruse scholastical reason, the most manifest misinterpretations or conscious perversions of law, at least help to show these facts as coefficients of social tendencies. One of the duties of legal science is to examine the origin, nature, effect, and value of the tendencies that become apparent in legal decisions, and thus to furnish a picture of what is going on in the administration of justice and what the causes thereof may be.[15]

Next come the actual legal transactions as such, even when they have given no occasion for resort to courts or governmental agencies. So far as boards of trade, banks, factories and shops are concerned, we can extract some instruction from the literature of economics and commercial law; similarly, as regards the conditions of labor, from sociological writings such as have furnished the material for Lotmar's broadly conceived work.[16] The enormous mass of material piled up in the offices of notaries and recorders of deeds still waits for the investigator. How much might be garnered here, not merely from the economic but also the juristic standpoint, is sufficiently apparent from works like that of Bartsch on the Austrian law concerning the recording of titles to real property. How far in advance of the systematic lawyers are the legal historians in the scientific treatment of archives! As far as I can see, there is not, in all of legal literature, a single scientific work on the science of modern legal documents. That is why it is possible to dig through a whole library of works on testamentary succession, to find therein numbers of clever and sagacious rules of construction but not a word to show what sort of wills *are* commonly drawn at the present time.

[15] In my paper on "Die stillschweigende Willenserklärung," I have tried to make use of the decisions in this manner.

[16] [See *Lotmar*, "Der Arbeitsvertrag," 2 vols. Leipzig, 1902, 1908. — TRANSL.]

§ 23. *Legal Regulation and Actual Life.* We must further inquire into the facts of daily life, apart from their legal aspect. We lawyers are always inclined to assume that our rule of decision is a faithful expression of how things are actually done, — that a rule of law is also a rule of life as it is. But in reality these may be two very different things. In reality life creates primarily its own rules. How small is the influence of the law of family, as formulated in rules, on the actual conduct of family life; how different the interpretation and execution of contracts in actual business from the interpretation by the courts in the few cases in which a decision passes upon them!

Learned Romanists reveal to us that what was in legal theory said to be the exclusive property of the "paterfamilias" was in reality held in common by his family, and that the "filiusfamilias," who according to the strict law had a status almost identical with that of a slave, had in reality a position entirely different, so great was sometimes, even in Rome, the difference between the archaizing rule of law and the rule of life. And we may be sure that to-day this difference is no less, considering that the rule of law is based in part on alien standards of decision, Roman or French, while the rule of life has grown out of native custom. Does anybody really believe that anywhere in Germany or Austria fathers actually do bestow marriage portions on their daughters in accordance with the rules of the Civil Code, or that vendors actually do make good the defects of their wares in the manner the law provides?

It is no answer to say that these are matters of popular custom, not of law; for both the duty of giving a marriage portion and the law of warranty for defects, as found in the much-lauded Roman law, arose themselves out of just such popular custom. In every healthy course

of legal development, a good custom will become transformed into a rule of law, while a bad custom will be opposed by both legislation and the decisions of the courts; but for both purposes it is necessary first of all to know the custom.[17] However, unless one narrowly identifies all law with rules of decision, one will have to admit that such customs, being forms of organization of modern society, are undoubtedly of a jural nature, and the reason they are not enforced legally is simply that the courts are not governed, as they were in Rome, by native rules of decision, but for the most part by alien or antiquated ones. That, however, need not keep a lawyer from investigating them. And it would be worth while some day to make an attempt at delineating the law of family of the present day, — meaning thereby the law according to which the members of families actually live, not the law according to which lawsuits regarding family quarrels are decided. Or one might undertake to show what property is actually like in woodland and meadow, field and pasture, instead of how it looks in the Civil Code. That, to be sure, would require not only great learning, especially of the historical sort, but also an extraordinary sense of realities. But, if it were done successfully, surely "the work would praise the master." For (to quote from Goethe's "Faust") "where'er you strike it, life is interesting."

[17] In Rome, as elsewhere, neighbors were accustomed to consider each other's convenience; in cases of litigation between neighbors, the duties which were, according to such custom, mutually owing to them became the basis of judgment. Such was the origin of the rules enumerated in *Windscheid's* "Pandekten," vol. 1, § 169, lines 1–8. To-day also neighbors are in the habit of considering each other's convenience in certain respects, but this custom is hardly ever utilized to arrive at a decision, simply because lawyers know nothing about it. Consequently it cannot develop into a rule of law. The limitations of property rights in favor of neighbors which are enumerated in *Windscheid's* "Pandekten," and which, having arisen out of Roman custom, became part of Roman law — these, and these alone, every lawyer is supposed to know — at least at the time of his examination.

§ 24. *Legal Science and the Courts.* Yet there are still further problems of quite a different nature waiting for legal science to solve them. Whoever desires that we possess a body of creative decisions must of course desire also a creative science of law. Manifestly, the tasks of the theoretical writer and the practical lawyer are closely akin. The task of the modern jurist cannot be essentially different from that of the jurist in all past ages, and especially from that of the Roman jurist. It would be a great mistake to imagine that the theoretical disputes of the Romans had to do with what were the traditional rules. Their discussions turned rather upon what would be the juster and more useful decision. As far back as Savigny and his immediate pupils, legal science has been called one of the sources of law, and ever since the celebrated paper by Jhering on "Unsere Aufgabe" appeared, there has been no lack of voices calling for a creative science of law. Even the old civilian science was creative to a degree, — although it did not by any means aim to be so. The law of possession, of agency, of contracts between absent parties, of agreements in favor of third parties, of unjust enrichment and many other subjects, may very properly be called the products of civilian science.

It is true that the desire to have an authority for everything, even where the authorities were obstinately silent, created obstacles at every step. What pitiful citations Jhering deemed it necessary to furnish in order to make palatable to himself and his contemporaries one of his cleverest ideas, the theory of negative interest in a contract! It is certainly not the business of legal science to predigest for the Court in the traditional manner of civilistic essays the decision of any case that might possibly come before it. In most cases the Court will be much better able to decide an actual case than any

theoretical author can do in advance. This is a matter in which science must learn from the actual administration of the law, not the courts from science.

Sometimes, however, the conditions are of the opposite character. This is so especially when the courts misunderstand the great social, economic or political problems that may be involved in cases coming before them, and still more so where they are confronted with an entirely new subject which cannot be dealt with except by extensive investigations such as no man can undertake who is immersed in the ever-changing business of practical life. It would be deplorable if a legal science could exist without mirroring the great movements and intellectual currents that rouse and animate our times.

§ 25. *Development of the Law of Evidence.* One of the most important tasks of this sort to which legal science must address itself in the future is the creation of an adequate law of evidence. In former centuries this matter was frequently treated by the jurists, and many valuable results of scientific investigations became embodied in the ancient codes of procedure. In this field, however, more than anywhere else, the fixation of the law in codes and statutes seems to have worked badly. It led to the formal or "legal" theory of proof, so called, and gradually imparted to the law of evidence a rigidity which became at last insupportable. The consequence of this was the substitution of the so-called "free weighing of evidence" for the formal theory, abolishing not merely the formal requirements of proof but all rules of evidence, a result which apparently Glaser, the principal advocate in Austria of this reform, had by no means intended.[18]

[18] See *Glaser*, "Zur Kritik des Zeugenbeweises," Gerichtssaal, vol. 33; *Glaser*, "Beiträge zur Lehre vom Beweis."

Such was the origin of the completely anarchical conditions with which we are still contending in the law of evidence. It shows what power mere catch-phrases may exercise over the human mind, for to argue for freedom of legal decision in general is commonly considered highly dangerous, while in this particular field of evidence the total absence not merely of legal limitations but of scientific orderliness is accepted as a matter of course. This is true to such an extent that the reversal of a judgment on appeal may be ordered for the most trifling error of law, and yet not for the greatest error in the weighing of evidence. As if under some circumstances a neglect of rational rules for the weighing of evidence might not have more serious consequences than a judgment not precisely in accord with some statutory provision of substantive law. The data collected by the indefatigable Hans Gross would alone be sufficient to furnish material for erecting the edifice of an adequate law of evidence. This, however, ought not to be fixed by statute but developed by jurists and judges, after the manner of the English law of evidence.

§ 26. *Conclusion.* It is thus apparent enough that there will be no lack of subjects for investigation for legal science in its quest for more modern things than are to be found in the traditional fields of inquiry. And we may well expect, if lawyers in the future seriously turn their attention to problems of this kind, that the prevalent popular notion of the jurist as a subtle, acute dialectician will have to be superseded by a different ideal. There will be no lament over this change of ideal. Of all the gifts of the human intellect, logical acumen is the least fruitful. There is profound wisdom in the fact that German legend frequently portrays the devil as a sharp dialectician.

CHAPTER III

DIALECTICISM AND TECHNICALITY: THE NEED OF SOCIOLOGICAL METHOD

By Johann Georg Gmelin[1]

I. On the Art of Administering Justice

§1. CODES AND JUDICIAL FUNCTIONS.—§2. STATUTES AND JUSTICE.—§3. THE DEMAND FOR REFORM.—§4. THE WRITINGS OF ERNST FUCHS.—§5. CRITICISM OF SUPREME COURT DECISIONS.—§6. MORE DECISIONS CRITICIZED.—§7. A FALSE METHOD.—§8. THE BETTER METHOD.—§9. CONCLUSION.

[1] [Justice of the Court of Appeals at Stuttgart. This translation is of his collection of essays under the original title "Quousque" (omitting the first and third essays), Hanover, 1910, Helwingsche Verlagsbuchhandlung. The translation is by *Ernest Bruncken*.]

AUTHOR'S PREFACE

The [four] papers here collected [two translated] are intended, in connection with the writings of *Ernst Fuchs*, of Karlsruhe, to call attention to some of the rocks toward which our administration of justice is steering on account of its excessive formalism and the scholastic and dialectical method on which that formalism is based.

How long is this idolatry of technicalities to last? Where will it carry us? What can we put in its place? These are questions which every judge ought to ponder.

The first two publications exhibit the small beginnings of what is now with me a settled conviction. Gradually these grew to such an extent that in the fourth paper, a sketch of which was originally published in "Württembergische Zeitschrift für Rechtspflege und Verwaltung," 1910, pp. 1 et seq., I could make the attempt to set forth the positive side of the sociological method. The third essay, on the "Lay Element in the Criminal Courts" is somewhat loosely connected with the general subject, yet here also the principal idea is the same as in the other papers, to wit: antagonism to the extreme technicalization of justice.

There is much still to be done in the way of studying the more profound aspects of the sociological method, and there is much material still to be collected. Let there be many earnest collaborators in the work!

Gmelin.

Stuttgart, end of January, 1910.

II. On the Sociological Method in the Administration of Justice

§ 10. LAW AND SOCIOLOGY. — § 11. MERE LOGICAL DEDUCTION NOT A SUFFICIENT METHOD. — § 12. THE SOCIOLOGICAL METHOD. — § 13. CRITICISM OF SUPREME COURT DECISIONS. — § 14. ANALYSIS OF CRITICISMS MADE BY FUCHS. — § 15. FURTHER CRITICISMS BY FUCHS. — § 16. A DIFFICULT CASE. — § 17. FURTHER CRITICISMS ANALYZED. — § 18. THE SUBJECT CONTINUED. — § 19. THE SUPREME COURT SOMETIMES SOCIOLOGICALLY CORRECT. — § 20. INDIVIDUAL ERRORS OR FALSE METHOD? — § 21. THE PREVAILING METHOD NOT WORKING PROPERLY. — § 22. THE SENSE OF JUSTICE. — § 23. THE THEORETICAL CONCEPTION OF JUDGMENT. — § 24. THE BALANCING OF INTERESTS. — § 25. THE NEED OF A CHANGE IN ATTITUDE. — § 26. OBJECTIONS TO THE NEW METHOD. — § 27. SOME OBJECTIONS REFUTED. — § 28. SOME OPINIONS REGARDING THE NEW METHOD. — § 29. VIEWS OF DÜRINGER. — § 30. VIEWS OF OTHER LAW WRITERS. — § 31. THE SUBJECT CONTINUED. — § 32. CONCLUSION.

I. On the Art of Administering Justice[2]

§ 1. *Codes and Judicial Functions.* When on January 1, 1900, throughout those parts of Germany where the Roman civil law had prevailed, the Roman law ceased to be in force, and the controversies raging around it disappeared together with the local statutes supplementing it, which frequently were just as hard to interpret, a good many people may have imagined that a new epoch had begun, an epoch in which a code, easy to use, would facilitate the decision of law cases which practical life produces in ever novel forms, by means of a few

[2] This discussion will be confined to the administration of law in civil cases.

easily framed pronouncements intelligible to everybody. That hope has not been fulfilled. The number of controversies is legion. The necessary tools of the practitioner include thick commentaries and a flood of published decisions by the highest courts that is rising in an actually menacing manner.[3]

This overproduction of book-lore can hardly be considered a blessing. What is needed for the administration of the law is not a dead learning, nor a cult of the letter, nor excessive reverence for precedent. A reasonable administration of justice depends on paying due regard to actual life and its circumstances. It requires a knowledge of the ideas present in the minds of litigants, presupposes a deep study of the practical ends pursued by individuals in their struggles for existence. It demands a knowledge of the manner of expression and the educational status of the average person, as well as of the manner in which he is likely to conceive right and wrong. Finally it requires some knowledge of the standard by which individuals measure themselves and others in their business and legal relations. About all this the judge will be able to glean information and instruction from commentaries and precedents only in a limited measure. He whose duty it is to administer justice must call to his aid the power of observation and the experience of life that is gained by continuous and open-minded observation. He should be conscious that what he is

[3] The excellent commentary by *Staudinger* deals with 2385 sections of the Civil Code and 218 sections of the supplementary act of introduction. The official edition of the decisions of the Imperial Supreme Court starts its volume 44 after January 1, 1900, and up to this time has added already 26 additional volumes. Counting 450 pages to an average volume, there are 11,700 pages which, according to present day notions, every judge must have read. Add to these the collections of decisions in JW, in "Recht," and in many other periodicals. The well-known commentaries of *Gaupp-Stein* on the Code of Civil Procedure and *Staub-Stranz* on the Commercial Code each have about 2,040 pages in their latest editions.

called upon to oppose to the will of individuals as the will of the State, i.e. the will of the community, must in no case be in reality opposed to the true will of such community.[4] Let him bear in mind that each legal controversy is caused, as one might say, by a morbid condition. Before his tribunal appears a section of human life that has been thrown into disorder, and it is his business to rearrange it. Then, like the truly wise physician, he will first of all try to find how he may help those who turn to him in confidence.[5]

The judge ought to perform his duty not with his head merely but also with his heart; he must exercise his imagination to place himself vividly into the circumstances of the parties appearing in the various tragedies and comedies on his docket, so that he may realize how they felt when they acted as they did, what ends they may have pursued, and whether such pursuit can be held blameless when considered with a view to the general welfare. Further, he must make clear in his mind what the parties, from their subjective points of view, expect from the government that is to give them what is their due, and whether such expectations are in accord with a true sense of justice or based on unfounded assumptions regarding the nature of their rights. And finally, the judge is to point out the true direction of the sense of justice implanted in all of us, like a magnetic needle, so to speak. True justice cannot be found in cold, logical ratiocinations, nor by a wisdom garnered in dusty books. If it is properly to be administered, the heart will have to be allowed a voice by assisting critical reason and controlling the inferences logic would draw from the statute,

[4] *Jhering*, "Law as a Means to an End," page 220 [in this Series].

[5] The judge, in pronouncing a judgment, really performs an act. . . . In all practical relations it is not sufficient to know what the facts are, but it is necessary to do something regarding them. (*Jhering*, "Zweck im Recht," vol. 2, p. 47.)

mitigating their harshness as far as that can be reconciled with the law as it is written, and harmonizing them with the demands of actual life. Administration of justice is "ars aequi et boni," as was said by the Romans more than eighteen hundred years ago. The judge who would think and act rightly in his function of rendering judgment must be able, as far as inelastic provisions of the statute do not prevent him, to discover in the law and make effective that which he himself, if placed in the situation of the parties, would feel to be right and just.

§ 2. *Statutes and Justice.* There may be an objection to this effect: we have no use for such doctrine. It means to put subjective feeling above law. Arbitrary judgment would rule in place of law, and that is precisely what a litigant will tolerate least of all. If such execrable principles were followed, insupportable uncertainty of law would be the result. Perhaps somebody might refer to Gustav Rümelin, who says in an address on the idea of justice:[6]

"No doubt the ideal of justice would be to consider and decide each case requiring the intervention of public authority by itself, in the light of all the surrounding special circumstances and characteristics. For each case is of a specific, individual nature. Not one is precisely like some other and therefore capable of being subsumed under some previously established rule with infallible certainty. If we were to imagine to ourselves a divine administration of justice, we should not doubt that such would be its procedure. It would not need a collection of general rules. But,"— Rümelin continues,— "this ideal is entirely unattainable for human purposes, and therefore is to be rejected."

Nor do I propose to claim for the German judge any such godlike authority. For one thing, one may rest assured that the 2385 sections of the Civil Code, together with 1048

[6] "Reden und Aufsätze," new series (1881), p. 197.

of the Code of Civil Procedure and 905 of the Commercial Code, and thousands upon thousands of sections in other statutes, are a sufficient barrier against the arbitrariness of German judges in all ordinary cases at least!

Yet, it would seem to appear with sufficiency from the textbooks, commentaries, and collections of decisions, that notwithstanding the plenitude of positive statutes, the current of ever-changing life produces day by day cases that do not permit a direct or unquestionable application of a statutory provision. For it is the exclusive purpose of all these books, by the side of the positive statutes, to formulate additional maxims and principles not to be found in the words of any statute, to deduce from the written text new rules, supplementary rules, exceptions, and thus to guide us to that correct, practical administration of justice which is the goal of all legal science. Whether the law that has thus been derived from positive statutes by means of interpretation and maxims or principles believed to be true, and maintained as such, is really calculated to promote and increase the rule of justice, must be tested in the last analysis by such administration of justice.

§ 3. *The Demand for Reforms.* Because the members of the German judiciary cherish a tradition of great reverence for commentaries and collections of decisions, they have on the whole rested in the quiet belief that everything is in the best of order; that under the guidance of the new code, legal science and the art of interpretation are flourishing and promise to do so in even greater measure in the future. Now and then, some practitioner may have been troubled by a scruple whether one could speak of a healthy condition when questions simple on their face, such as the daily grist of the courts produces them, cannot be solved except by a vast expenditure of reasoning and analysis of prior decisions and

the contradictory opinions of authors. We may use as illustrations questions arising with regard to the nature of actions for rescission of contracts of sale and the necessity of specific demand for acceptance of the goods by the vendor. In regard to the latter point, even Staub, who is ordinarily very practical, advocated a formal demand,[7] but subsequently[8] the Imperial Supreme Court decided in the way which alone has practical sense, just as it has done regarding the true nature of the action for rescission.[9] However, when we try to see what the result of the contest raging about these questions really amounts to, all we can say after we have drawn the kernel out of the chestnut is this: to require, in cases of rescission, that the fact of rescission must first be established in the judgment before the legal consequences of such an act can be enforced must needs force us into useless, nugatory and therefore objectionable circumlocution. The second controversy would never have arisen at all if the question had been asked whether there could be any sense in compelling an honest vendor, whose vendee has definitely refused to accept the goods, to make a further demand and thereby expose himself to being snubbed. For according to the feeling among business men the vendee might well object to having his definite declaration of intention treated as if he had not meant it.

As a matter of fact, the reasons given in the Supreme Court decisions on these two questions amount to nothing more than a statement of the points given above.[10] At

[7] "Kommentar zum HGB," 6th and 7th ed., notes 75 and 92 in the excursus regarding section 374.

[8] RGZ 51, p. 350, and passim.

[9] RGZ 58, p. 424.

[10] RGZ 51, p. 350, puts the matter very pertinently by saying that "we cannot assume that in legal intercourse purposeless and superfluous acts are required." — In the same volume it is held that a clerk who has been discharged without cause need not expressly declare his willingness to serve. (*Römer*, in DJZ (1903), p. 340.)

least these two points are the only ones of practical importance. All the rest is very learned, but superfluous, all the more superfluous because nobody can doubt that from all these so-called scientific reasons the opposite conclusion might have been drawn quite as well.

As we said above, for some time it has happened now and then that some judge began to doubt, in view of this and other cases, whether we had really touched such glorious heights of perfection. Then a champion arose to gather up the scattered doubts, to condense and intensify them, and in eloquent language to announce as the result of acute critical analysis something like the following:

"There is something wrong about our entire system. The judgments rendered by our courts are founded on a method of scholastic formalism which, in the last analysis, is caused by an erroneous method of training in school and university. The true kernel of the judicial function, which should consist of a balancing of the interests of the contending parties — in other words, the sociological factor — is lost sight of or at best admitted in a shamefaced manner as a trifling auxiliary. We must see to it that the judicial bench shall foster a sociological development of law, so that the opposing interests of parties may be reconciled according as one or the other interest has the better right on its side. That is the only manner of administering justice which is promotive of good and in accordance with the needs of the litigating public. If courts proceeded in such a way, we could again hope that the dry branch of our administration of law might flourish once more and we might hear nothing further of the reputation of judges for lacking a knowledge of actual life."

§ 4. *The Writings of Ernst Fuchs.* This is, in a summary way, the general trend of those opinions which

Ernst Fuchs, in various books and articles,[11] has published and defended, not without encountering vehement contradiction and opposition.

If one starts with an inclination toward a conception of the judicial function such as was outlined above, he will not find it difficult to approve of the new doctrine. In so far as existing conditions are assailed thereby, this doctrine will of course first of all have to prove its right to exist by showing that the defects it charges against the administration of justice at the present day actually exist and are caused by judicial methods. Now it is fairly easy to test the correctness of the propositions maintained by Fuchs, because they are supported by a considerable number of criticisms of recent decisions by the Imperial Supreme Court, criticisms which, we must admit, are decidedly trenchant and bitter. We cannot follow these criticisms into every detail and thus, as one might say, effect a revision by a tribunal of the fifth instance. We may, however, warmly recommend to every judge their serious study. In this place we can give but a few observations and show by a few illustrations how much of these criticisms will stand the test of an independent examination.[12]

§ 5. *Criticism of Supreme Court Decisions.* As far as the outward form of decisions by the Imperial Supreme Court is concerned, the suggestion has often been made that long-winded periods and clumsy expressions ought

[11] "Schreibjustiz und Richterkönigtum"; "Recht und Wahrheit in unserer heutigen Justiz." See also: "Holdheim's Monatsschrift," 1908, p. 161 et seq., 1909, p. 29 (now inserted in the work "Gemeinschädlichkeit der konstruktiven Jurisprudenz," (vide infra); "Württembergische Zeitschrift für Recht und Verwaltung," 1909, p. 1 et seq.

[12] It seems at bottom self-evident that criticisms of this kind must be directed principally against the highest court in Germany. As things are, the decisions in the lower courts are to a great extent dependent on those of the Imperial Court. Nobody will deny, therefore, that consistent errors, if they can be proven in the decisions of the Imperial Supreme Court, will also be found in those of the lower courts.

to be avoided. Even recently, however, one may find in a Supreme Court case [13] a single sentence containing 121 words. To insert into a decision long citations does lighten the labors of future legal authors, but strictly such quotations are not a part of the business of the court, which should keep in mind first of all the convenience of the litigants. The dignity of courts requires that their opinions, which in effect are the commands of the State, shall be pronounced with decision and not bear on their face the vestiges of painful mental labor. Before what the court has to say is given publicity, all attacks of the "maladie de doute" must have been cured. To show to the parties that the court had to struggle with doubts had better be avoided. In some cases it may be very profitable to dig into the history of the origin of the law, but ordinarily that sort of toil need not be paraded in public.

In the field of private law a large part of the controversies have no particular scientific interest. The full quorum of the Imperial Supreme Court uses ten printed pages to discuss the question [14] whether an action abates when a party dies after a judgment in appeal has been served upon him, but before he has moved for a revision and the party is still represented by the attorney of record in the appellate court. That might well have been decided and the reasons stated in a few words. In a case like this, as in many other cases relating to practice, the decisive thing is not some scientific reason but the convenience of daily life. Arguments based on scientific grounds but losing sight of this practical consideration will have to be rejected because they are not applicable and therefore incorrect. For instance,[15]

[13] RGZ 65, p. 318.
[14] RGZ 68, pp. 247–257.
[15] RGZ 16, p. 395. The two cases next following have not been discussed by *Fuchs*.

the proposition maintained by the Supreme Court in another decision, according to which the possession of a document containing material evidence can be proven only by producing the document, and not by witnesses, seems to me to have no practical value, although the commentaries go on upholding it. Why should I not be permitted to prove by witnesses that my opponent is not telling the truth when he swears that he does not have the document; and after that has been established, why should not a witness be heard under oath to tell what the document contained? Further, it might be interesting to know whether any court ever required a party who at the first oral hearing refused to be sworn, to take the oath afterward, merely in order that such party, who according to his own declaration cannot take the oath, may have an opportunity to make up his mind whether he really cannot take that oath?[16] And what, finally, is the real, practical substance of that eminently "scientific" question, the "contingent counterclaim," except the recognition of the utter absurdity of deciding an action in such a manner as to make a new lawsuit the unavoidable consequence?[17]

The entire subject of service of papers, as contained in the Code of Civil Procedure, is distinguished from the corresponding provisions everywhere else (as, for instance, in the acts regarding the industrial and commercial courts) by absurdities and senseless formalism, causing the loss of many a good case at the expense of parties. Decisions on such points have no real scientific interest; they are a treadmill toil which has been imposed on the courts by defective legislation.

[16] According to *Gaupp-Stein*, note I, 2, to sect. 464, the provisions of sect. 464, par. 2, of the Civil Code apply only where the court has imposed the oath upon the party.

[17] This agrees with *Gaupp-Stein*, note 2, to § 300 ZPO.

§ 6. *More Decisions Criticized.* In the field of private substantive law we may furnish the following illustrations:

In another case,[18] we find a decision that the Civil Code[19] cannot be invoked in favor of the family, the father of which was drowned by falling into an insufficiently guarded stream which ran through a village. On this decision one may comment to the effect that the number of beneficiaries in contemplation ought not indeed to be extended too far, for if that were done perhaps even the State might sue for damages because it lost a citizen. Yet I am unable to see what there is to prevent the court from holding that those members of the family who were entitled to support by the deceased were entitled to the benefit of the code provision, when the penal provisions[20] of the concurrent Penal Code were enacted for that purpose. Surely the highest court in the German Empire may claim authority sufficient to declare this to be law on its own responsibility. That would be a great deal more satisfactory than its hiding behind the narrowest construction of the letter of the statute.

The same criticism is true of the decision found in still another case.[21] There the mother of a girl who had, at her own request, been killed by her lover and been buried in the "suicide corner" of the cemetery at Düsseldorf, demanded reimbursement out of the estate of the lover for the cost of transferring the girl's body to Berlin. The court denied the claim. Here is an issue between the heart of a mother and the purse of a murderer. Was it necessary to save the latter?

Absolutely inhuman! — this is an expression I used regarding this case before I knew of the identical

[18] RGZ 64, p. 344.
[19] BGB 823, par. 2.
[20] Sec. 367, subs. 12.
[21] RGZ 66, p. 305.

criticism by Fuchs[22] — it seems to me absolutely inhuman, where the judge, called in to draw a will and finding the testatrix in a paralyzed condition, is required, in order to comply with the letter of the statute, to have the dying person make an express declaration that she is unable to write.[23]

§ 7. *A False Method.* Enough of this![24] Let us ask: What profiteth, in such cases, an intimate acquaintance with all the commentaries, monographs, and annotations of the statutes? Are not these all very simple questions which, as it happens, the statutes have not expressly provided for, but for which anybody can find the answer in his own good sense in order to realize "the law that is born with us," which we are sorry to say, in the cases cited, is not the law as laid down by the Imperial Supreme Court?

And unfortunately it is true that these three "anti-sociological" decisions may be the worst but are by no means the only ones that give evidence of the existence of a false system, a formalistic, narrow-minded method of interpretation, which is satisfied when the letter of the law has been applied to cases for which according to general human feeling it is not intended. Fuchs is right when he says that again and again we meet with judicial decisions that are far removed from that which a mind not sophisticated by scholastic argumentation would deem just and proper.

If the method in which we, who have grown up under a formalistic training, have learned to find the only salvation, and regarding which we are apt to forget

[22] "Holdheim's Monatsschrift," 1909, p. 52, col. 1.

[23] RGZ 69, p. 79.

[24] In passing I wish to state that I substantially agree with the criticisms expressed by *Fuchs* ("Recht und Wahrheit" pp. 25–88) relative, among others, to the following decisions: JW 1907, p. 301, no. 3; RGZ 65, no. 16; 66, nos. 14, 50, 62, 67.

that by logic we can guarantee the formal correctness of procedure but never the correctness of the results[25] [26]— if that method leads to such unfortunate results, why, then, something else must be substituted for it. And would it really be arrogant and worthy of condemnation if a German judge should remember his sense of justice and emphasize — even in express words — what he believes to be just and equitable in the case to be decided, and then proceed to show that what he has thus found to be just is really in harmony with the established law? For the law has in its favor the presumption of being reasonable,[27] and according to Thöl the statute may be more intelligent than the legislator.

§ 8. *The Better Method.* With reference to the letter of the statute, the law also should be interpreted in the way in which, according to the Civil Code,[28] private declarations are to be interpreted. Where we are dealing with principles which have themselves been produced by scientific deduction from the statutes, we should never forget that such principles are not dogmas. The matter was recently put very aptly by Max Rümelin.[29] He says: "We shall incline easiest toward declining an inference from the mere letter in those cases where the statute itself, by provisions regarding other interests to be considered, shows that our inference is wrong; in such cases we are still within the field of textual interpretation. However, we ought not to stop there. Whenever important considerations demand it, we must

[25] *Sigwart*, "Logik," vol. 1, sect. 2.

[26] The most frequent error involved in this method is that we operate with the "argumentum â contrario" where we should draw a conclusion by analogy, or the opposite, as is shown by *Fuchs* in a great many examples.

[27] *Wach*, "Handbuch des Zivilprozesses," vol. 1, page 258.

[28] BGB, § 133.

[29] In his very remarkable academic address of November, 1908, on "Das neue schweizerische Zivilgesetzbuch und seine Bedeutung für uns." (Tübingen, 1908, Mohr, p. 31.)

fall back on the presumption that the legislator meant to be reasonable, and could not have intended an absurd decision. The more sensitive and fine a feeling for justice is evolved, the less shall we be satisfied with decisions not evidently right on the merits. When the law has become highly developed we may even arrive at this rule of interpretation, that disputes which had never been contemplated by the legislator, especially such as had never arisen in practice before the statute was made, cannot, in cases of doubt, be construed as covered by the expressions of the text."

I do not believe that there is danger of impairing the certainty of the administration of the law by greater emphasis being laid on the sense of justice, in the way advocated here. I am rather inclined to believe that our administration of justice will be rejuvenated thereby. Excessive formalism must go, and for it must be substituted a more natural conception that will harmonize with the actual conditions of social life, so as to insist consciously upon the practical needs dictated by our sense of justice.

An alluring task would be to discuss the question whether the preparation offered by our schools may not need reforming. However, from that I must refrain. I should say that all conversant with existing conditions are agreed that there is such need, and they also agree, probably, that the legal profession whose members are so often charged with being strangers to real life, would be the greatest gainer from a reform that would put training for practical thought and action in place of mere formal education of the reasoning faculty. We should wish that the law student at the university might be enabled to avoid mere narrow specialization and could come into touch as much as possible with other branches of knowledge.

§ 9. *Conclusion.* In recapitulation, we may say this: There is good reason why discussions have recently arisen regarding the art of administering justice. In part, at least, that art is still far removed from the ideal I proposed at the beginning of this paper. What we judges require in the practice of our daily labors is not merely a logical elaboration of the legal matters submitted to us in each case, but an energetic progress toward the goal of realizing justice on the foundations of positive law. We need a vivid understanding of the facts,[30] a sympathetic treatment of the human destinies that are passing before our eyes. We must strive to penetrate into the needs of the parties who come before the judge as patients come before the physician, so that we may not offer them the stone of bald reasoning but the bread of sympathetic relief. Let us break with the habit of using our decisions to parade learned disquisitions, expressed in diffuse verbiage incomprehensible to the layman! Much would be gained if the writers of the million or so opinions accompanying judgments rendered annually in the German Empire were all firmly agreed to shun all scholastic subtleties, artificial deductions and forced constructions. They might well take for their motto the lines of Goethe:

> "Good sense and honest judgment will
> With little art expound themselves."

A determination to follow such principles will take the German judiciary a good deal farther than all the pretended learning they can infuse into their labors.

[30] That is why the ability of a judge shows itself nowhere more plainly than in the manner in which he handles the facts and puts questions to the witnesses.

II. On the Sociological Method in the Administration of Justice[31]

"What we are striving for is that the courts may find the right judgment on the merits by practical sense and true comprehension of the facts, instead of the correct logical deduction by the help of scholastic subtleties."—*Ernst Fuchs*, "Württembergische Zeitung für Rechtspflege und Verwaltung," 1909, p. 5.

§ 10. *Law and Sociology.* Our first question shall be: Are we justified in claiming that there is a modern tendency in the law, so markedly distinct by its characteristics from what has been customary, that we are able and compelled to attribute to it independent importance and a specific appellation?

As a matter of fact I do believe that the social ideas of our time, and the new science of sociology built up on them, have made their way even into that most conservative of all provinces of intellectual activity, the law. At the present time, the method of legal science is, on the whole, that of the system-builder, and the method of administering the law is that of enforcing a statute, if I may use that expression. All effort is directed toward "bringing the case within the statute," in accordance with the authority of the State. In keeping with this method, we are tracking the expressed intention of the legislator into its most remote hiding-places.[32] And when that has been done we apply, by a chain of deductions, the rules that may be plainly in existence, or if

[31] I received the impetus to write this essay from a request by the editor of the "Württembergische Zeitschrift für Rechtspflege und Verwaltung," to review the book by *Ernst Fuchs*, entitled "Die Gemeingefährlichkeit der konstruktiven Jurisprudenz" (Karlsruhe, 1909; Braun). From this review (in the year 1910, pp. 1 et seq.) the present paper has been evolved. The above book will hereafter be cited as "G," followed by the page numbers. The work by the same author, "Recht und Wahrheit in der heutigen Justiz" (Berlin, 1908, Heyman), will be cited as "R&W," followed by the page numbers.

[32] "All that is needed now is to put the draftsmen on oath to testify what they had in mind, or what they would have thought about a particular case if they had thought of it at all." ("G" 11.)

necessary discovered in the dialectic manner, to the facts of the case, with the implied assumption that the State requires the application of the statute equally to every state of facts that can possibly arise.

Regarding these principles we must say generally, first of all, that they cannot but lead to a mere formalistic administration of the law, so that we must needs look for some other source from which to derive the means of supplementing and vivifying our labors. Such a source we may find, agreeably to certain modern conceptions, in the recognition that the kernel of all legal contentions is a dispute regarding certain interests which the law protects, be it interests of a pecuniary, be it such of an ideal nature. Accordingly, the task of judicial determination should be to understand the merits of such conflicts of interests, to find out their essential nature, and to reconcile them by balancing them against each other in the manner of an unbiased arbitrator who stands above the parties and bears in mind both the advantage of the contending individuals and the general welfare. Individual advantage, because that is what the parties are seeking to protect; the general welfare, because that enters into the problem not merely on account of the interest the public has in the certainty of justice, i.e. in the equal adjudication of equal cases, but also because the public is interested in having each case determined justly. For each case must be considered the type of a series of similar cases. The method here outlined, by which it is sought to substitute for the primary importance of logical concepts the importance of a balancing of real interests, we may call the sociological method. Sociology, to be sure, is a name given to a science which attempts to investigate the laws by which society exists and the various social groups are related to each other. Yet we need not hesitate to apply the name to a scientific

method which finds its models in the science of sociology, and which, in the field of private law, deals with the investigation of contending interests. For are not these, to a great extent, the interests of struggling social groups?[33]

The sociological science of private law, then, would be that science which deals with those legal interests falling under the domain of private law, and with the correlative values of such interests. Sociological administration of justice would be that manner of administering the law which, in pursuance of the above idea, lays the greatest stress in adjudicating cases on the importance of the real interests involved, and tries to arrive at the correct decision from this point of view. It does not follow from this, however, either that the positive statute is to be disregarded or that systematic legal science, which is well pictured as the stout backbone of the law, need be thrown aside. Yet if it is true that in consequence of the fact that the sociological method ascribes greater importance to the real interests involved in each separate case, and aims primarily at a decision on the basis of the real merits, it is likely that the results of adjudication, taken as a whole, will show a different aspect. The ideal method of administering justice, as has been aptly remarked by Sinzheimer,[34] will at last be attained by a mutual supplementation and interpenetration of systematic legal science and the fundamental ideas of sociology. In doing so sociology needs systematic science, which prepares the proper juridical form; but on the other hand we must acknowledge that pure systematic jurisprudence, without the assistance of sociological principles, does not suffice to enlighten us

[33] Employers and employed, producers and consumers (or vendors and purchasers), lessors and lessees, those seeking employment and the agents who try to procure it, and so forth.

[34] "Die soziologische Methode in der Privatrechtswissenschaft," Munich, 1909, Rieger.

regarding the actual life which is the subject-matter of legal activities. For that reason mere systematic jurisprudence by itself should no longer be recognized as a proper basis for the administration of justice.

§ 11. *Mere Logical Deduction not a Sufficient Method.* We shall have to admit without qualification that in the past also consideration of the real merits of a cause and a balancing of material as well as legal interests has not been altogether neglected either by legal science or legal practice. Yet a more conscious attempt is now being made to gain for this idea a recognition to which it is entitled and which, as its champions assume, has not heretofore been given to it in proportion to its importance. It is no longer deemed sufficient merely to control and, if necessary, rectify the result gained in the way of logical deduction from legal concepts, by considering the needs of the subject-matter and the reasonableness of the decision, as was laid down by Jhering and Kohler. Instead, we are from the beginning to aim consciously at a practically useful and reasonable result.

So far as heretofore the sociological idea has had a place in the administration of the law at all, it has been employed clandestinely, as it were. The notion has prevailed that the subjective sense of justice, which is the foundation of the sociological idea but which has generally been identified with arbitrary discretion, is altogether unfit to become the positive basis of administering justice. Some have gone so far as to advocate the total elimination of this feeling, and it is by no means improbable that among the judges there are all too many unrevealed adherents of this view. Yet they make no objection to the harmless notion of "equity," which at bottom is identical with the sense of justice, and forget that every decision based on "good faith" is in reality built up on that very feeling.

A result of all this has been that the decisions of the courts were frequently enough, as a matter of fact, in harmony with the substantial justice of the specific case, but the true reasons were relegated to some remote corner in the opinion, so that they appeared like some mere embellishment rather than the basis of the decision which in truth they were.[35] This is the "cryptosociological" method which was first pointed out in the articles cited in the note to the title of this paper, and can easily be traced in a good many reported cases. It consists in the judge having found the true sociological conclusion, but afterwards fitting a scholastic chain of merely formal logic to it as the pretended means of arriving at the result. This is the method that hereafter is to be abandoned.

If we should succeed in evolving a true sociological method such as is probably the ideal of many practitioners,[36] out of this cryptosociological one, the words of

[35] On this point it is said very truly in "G" 39 (comp. also 69) that according to present practice the decision frequently "reasons backward." Although here also "the goal points the way," yet the decision appears as if it were read out of the statute or the intention of the legislator, while in reality it has been read into the statute. Thus there is in such decisions a sort of hypocrisy, which is frequently enough apparently suspected by the writer of the opinion although he does not realize what the cause of the trouble is. This difficulty we shall have to get rid of. — A very instructive example occurs in RGZ 69, p. 363, which is discussed at length in "G" 65, where it may be read. As a further example *Fuchs* gives the two decisions relating to the purchase of a brothel (RGZ 63, p. 179; 69, p. 97), of which the second was manifestly different from the first for no reason except that the second judgment was held to be more in accordance with substantial justice. (See "G" 65.)

[36] I may be permitted to quote the interesting expressions of Mr. *Stabel*, late minister of justice of the Grand Duchy of Baden. He used to exhort young judges in this manner: "When a case is to be decided, you had better at first leave your Code alone. After you understand the facts thoroughly, consider what would be right according to your common sense and the law of nature and equity; then, when you have thoroughly made up your minds on the case, look at your Code, and behold! you will find that the statute fits your own conclusion exactly in almost all cases, and that its intention is nothing but what you intend also." — It is entirely true that by following that method an unbiased judge will find at first glance what is true and right in thousands of cases.

William Stern[37] will be realized, who says, very aptly: "The great forward movements of science are not composed of the sudden emergence of new concepts and ideas out of nothingness, but rather consist in this, that familiar experiences, which hitherto were accepted as matters of course, are subjected to criticism, so that their problematical character is recognized and an endeavor to understand them is put in the place of an acquiescence in what is supposed to be self-evident."

Of itself the sociological method does not involve the question whether the courts are bound by the letter of a statute or may, upon occasion, disregard it even where there is no ambiguity. It is therefore of a nature quite distinct from the real school of "free legal decision," which favors such a mode of procedure.[38] However, its character is such that it will produce a more independent attitude of the judge in relation to the letter of the statute as compared with the systematic conception which knows of nothing but what is contained in the words as they are written.

I should object decidedly to the term "modernism," which has of late become familiar. This suggests certain currents of thought struggling for greater liberty in regard to Catholic ecclesiastical dogma, which arouse considerable opposition. Therefore this term introduces

[37] "Psychologie der individuellen Differenzen," Leipzig 1900, p. 7.

[38] *Fuchs* does not belong to these extremists. (See "G" 129; "R&W" 11.) For the rest, I should incline to eliminate, as immaterial to the practical administration of law, the theoretical question whether the courts are to be confined to interpretation of existing law or may, on proper occasions, themselves supply a rule for a case which the formulated law has not covered. That discussion will merely afford opportunities for renewed scholastic disputes ("G" 75). This is all the more true because the sociological method goes beyond mere interpretation of statutes and requires a balancing of interests even where the statute taken by itself is clear enough. Such is the case, for instance, when we apply concepts like "contrâ bonos mores," constructive fraud, and similar things. Comp. "G" 131, note: "We are not dealing . . . simply with the interpretation of statutes, but with the very nature of legal justice."

into the discussions of juridical science a highly undesirable element. We should avoid carrying the bitterness with which the fight is carried on in the ecclesiastical field into our scientific disputes, or to exacerbate the latter without necessity.

§ 12. *The Sociological Method.* The very important question now presents itself whether the sociological method contains germs capable of such growth that a future scientific harvest may be expected therefrom. The new doctrine will not succeed unless it can be brought into definite, consistent form and unless it can be proven that it is not merely a negation but has a positive content. What follows is intended to form a contribution toward accomplishing that purpose.

The most determined champion of the new tendency is Ernst Fuchs, and therefore he and his observations will first occupy our attention. Even his opponents, of whom he has not a few, do not deny that Fuchs is gifted with acute critical powers.[39] We may surely take his word for it when he says that he does not deal with particular defects but the whole system, the results of which "make his hair stand on end."[40] Again, he says that in his researches he finds "an ocean of injustice"[41] and that his heart bleeds when he reads decisions of which he cannot approve and in which "justice is wrecked upon the rock of scholasticism."[42] Furthermore, nothing can be found in his book to cast a doubt on the purity of his intentions.[43] We must frankly admit, however,

[39] "A very ingenious book," is what *Vierhaus* said of "R&W" at the Karlsruhe meeting of the German Lawyers' Association (vide "Verhandlungen des 29. Deutschen Juristentags," vol. 5, p. 579).

[40] "G" 63.

[41] "G" 64.

[42] "G" 113, note 7.

[43] It speaks particularly well for him, as an advocate, that he insists, in chapter 6, emphatically on the attorney's duty of absolute truthfulness toward the court.

that his criticisms, which often drag wholly irrelevant matters like Nietzsche or questions of religion into the argument, frequently go far beyond the proper bounds. Sometimes he is downright unjust, as for instance in his treatment of the Roman law[44] and of Jhering.[45] It

[44] An essay like "G" is hardly the place in which to dispose of the tremendous issues relative to the importance of the Roman law for Germany. Even the most convinced champions of Germanic law do not share the radical views of *Fuchs*. I need but refer to the observations of *Cosack* ("Lehrbuch," 5th ed., vol. 1, sect. 4) in which he distributes light and shade with an even hand. In my opinion the Romans will remain for all times the model of a people with a genius for law. The development of legal institutions in Rome proceeded on the one hand without interruption and on the other hand in accordance with a tenacious conservatism that would have been impossible without a national character in which force and ethical principle were mixed in wonderful measure. (Comp. *Chamberlain*, "Foundations of the Nineteenth Century," vol. 1, chap. 2.) *Fuchs* himself recognizes that the Romans cannot be held responsible for what their successors did with Roman law. We must admit that the trouble caused by present-day scholasticism is due to the ossification which Roman law underwent in the course of centuries, and I welcome a revolt against what *Fuchs* very happily stigmatizes as "pandectology." I am at a loss, however, to see what is to be proved by the section from Digest, Tit. de Ædilicio edicto (lib. xxi). The cases there set forth were no doubt entirely appropriate as a guide to practical application at the time when they were compiled. They are still very instructive. We should be fortunate if the "ratio legis" were always exhibited so ingeniously in modern statutes as it is in the excellent section 1 of this title which is built up altogether on a sociological foundation. We must say that *Fuchs's* onslaught on Roman law constitutes a sort of "attempt by insufficient means."

[45] By the side of many passages in which *Jhering's* views are frankly approved, there is a passage ("G" 108) in which a sentence from "Law as a Means to an End," p. 150, taken out of its context, furnishes the occasion for a vehement attack on *Jhering*. But this arrow misses the mark. *Jhering* had a strong sense of humor and satire. Of course he did not mean to advocate conscious fortune-hunting; but he speaks of the marriage of rich women to high officials as something which is often met with and is caused by social conditions as they actually exist, describing it as a phenomenon of life in society that is useful to the State by permitting it to keep the salaries of officials low. Whoever criticises this passage, intended to be ironical, as being brutal has entirely missed its meaning. — The criticisms leveled against "Law as a Means to an End" seem to me to be entirely mistaken. *Jhering*, the man who was the first to examine and explain the Roman law, not merely as regards its form and verbal meaning, but regarding its real substantial contents; who (in "Scherz und Ernst") first held the mirror up to scholasticism; who devised the definition of law as "interests protected by the authority of the State," and who is celebrated as the original author of the sociological method

would, however be acting unwisely and contrary to the precept that we should prove all things and hold fast to the good, if on account of the obvious exaggerations in many of his ideas and propositions, and the intemperance of his language, we should reject also those sentences in which he calls especially on us judges, in a manner well worth heeding, to search our consciences and examine into the character of our labors, and in which he holds up before us most important incitements for a reforming movement.[46]

The glory of being the founder of an entirely new doctrine is not claimed by Fuchs. He rather attributes it to Gény, the Frenchman, while Düringer[47] claims this honor for Ehrlich.[48]

§ 13. *Criticism of Supreme Court Decisions.* In subjecting the present state of theoretical doctrine and of the administration of justice in Germany to critical examination, one may very properly begin with the theory and proceed thence to the practice which has naturally been evolved from theory and is consequently dependent on it. It is also possible to begin with practice itself and go behind it to the underlying theory. If in doing so we should prove, by the analysis of a considerable number of decisions, that they have all been rendered according to a certain method, and if we should further show that this method is based on error, we shall be able to

on account of his analysis of the interests the protection of which is the object of law — a man like that has written no works which one may dispose of "by jeers and ridicule." — Nor will the attack by *Kohler* ("Rechtsphilosophie" [translated in this Series], p. 16) extinguish the importance of *Jhering*, whose work will be of the greatest benefit in promoting the work that has now begun.

[46] It will not do, as I shall show presently, to try to pass it off with the sort of talk frequently heard, that *Fuchs* is not to be taken seriously on account of his exaggerations, or that a criticism of his criticisms is superfluous.

[47] "Das Recht," 1908, p. 259.

[48] [Both *Gény* and *Ehrlich* are represented in this volume.]

find that analogous faults exist in the theoretical doctrine also, and may proceed further to find the causes that bring about such faults.

Thus we have at our disposal a deductive and an inductive method by which to find the sources of error that may possibly exist. The last-named method presents the difficulty of involving necessarily a criticism of and possibly opposition to the character of the decisions rendered by the Imperial Supreme Court, which exercise so great an influence. For an analysis of these decisions is most certain to deal with what is most typical in the present work of the judiciary.[49] On the other hand, this mode of procedure has the very considerable advantage that by it we can bring forward tangible results to serve as the basis of further scientific deductions.

This method had never been adopted to the same extent, although it is of special interest to those engaged in practical judicial work, until Fuchs employed it with the conscious intention not to find fault with particular errors or defects, but to prove on the firm foundation of the material so collected that the prevalent method as a whole was erroneous. Thus he gains the great advantage of compelling everybody who would claim scientific standing in this discussion to consider whether the definite cases examined by Fuchs are justly criticized or not.[50] I have already stated in another place[51] that I do not see how one can avoid admitting frankly the justification of many points raised by Fuchs, and I need not retract anything of what I have said.

[49] I have carefully considered whether I ought not to refrain from using this method in order not to weaken the authority of the courts, but arrived at a negative conclusion.

[50] Even the judges in the courts below the Imperial Court ought not to refrain from taking part in this scientific task.

[51] "Württembergische Zeitung für Rechtspflege und Verwaltung," 1908, p. 467; "Deutsche Richterzeitung," 1909, p. 98.

Yet there is no way of avoiding, in this place, a detailed discussion and to proceed step by step to an analysis of the material submitted by Fuchs.

§ 14. *Analysis of the Criticisms Made by Fuchs.* First of all, Fuchs takes exception to the position taken by the Imperial Court regarding the doctrine of "dommage moral" in the districts formerly under the French "Code Civil," a doctrine which, according to him, the French Court of Cassation had worked out with admirable sociological insight.[52] These exceptions seem to be substantially well taken[53] as seems to be admitted even by Düringer.[54] As to the next case discussed,[55] Fuchs maintains that the head of a household is entitled to damages for the negligent killing of members of the household who had been in the habit of turning over to him the whole or a part of their earnings, although they were not obliged to do so by law — as had been done in the case in question. It seems to me that in accordance with the general principles of liability of the Code[56] the plaintiff here was entitled to damages, although the letter of the Code provision[57] does not cover such a case. Otherwise he would be worse off than if some profitable domestic animal belonging to him had been killed. Only the specific provisions of the section[58] relating to the duration of the duty of paying indemnity and similar things, could have no application. We cannot admit that the wording of the statute made the opposite decision necessary. It would really seem as if the court

[52] "R&W" pp. 25 seq.

[53] Cf. also "G" pp. 53, 54.

[54] "Richter und Rechtsprechung," p. 17, note 2, Leipzig, Veit, 1909.

[55] "R&W" p. 27, discussing a decision dated June 10, 1907, as printed in "Juristische Wochenblatt," 1907, p. 480, No. 2.

[56] BGB § 249.

[57] BGB § 844, par. 2.

[58] BGB § 844, par. 2.

might have had the courage of giving a liberal construction to the statute, if they had taken into consideration the suggestion offered by Fuchs that otherwise a father, who through the assistance of his numerous sons and daughters was on the road to wealth, might have all of his children shot one by one, without being entitled to civil damages.[59]

In the next case[60] criticized in the author's essay a married woman, living under the rule of joint administration of the estates, who sues with the consent of her husband, is ordered to prove that the subject-matter of the action relates to her, and not to her husband's, estate. For that purpose the cause is remanded to the court below. That whole matter might have been definitely settled by the observation of Fuchs[61] as follows: "As the husband, being the head of the marital community, had consented to bringing the action, such legal subtleties were quite immaterial."[62]

Then comes a discussion[63] of a decision[64] in which it was held that the family of a man who had been

[59] Having a deeply-rooted conviction that in the matter of the "dommage moral" the German courts have unfortunately shown themselves inferior to the French, and that in the second case mentioned above, under a proper interpretation of the statute, the father would have received damages for the wrongful killing of his child, *Fuchs*, on page 28, allows himself to exclaim: "One is indeed tempted to call to arms, but not against creative but against eunuch-like administration of law." I am the last to fail in strong reproval of such a slip, but also the last to believe that an author should be anathemized because of this bitter outcry, which was caused by a not unjustifiable feeling that the manner in which justice is administered in Germany does in such cases fail to show a proper creative force ("the highest quality," "G" 187). — In "G" 63, 64, there is also a gross contempt of court deserving reproof.

[60] RGZ 64, no. 81, p. 323.

[61] "R&W" p. 31.

[62] That is true notwithstanding *Düringer's* observations in "Recht," 1908, p. 264. Compare also "G" 44–46, where Düringer's telltale expression "What has sympathy to do with a court of review?" is properly animadverted upon. The author there says that the compass of feeling for justice must be pointing in the wrong direction where such a question can be answered in the negative.

[63] "R&W" pp. 32, 37.

[64] RGZ 64, no. 85, p. 344.

drowned in an insufficiently guarded stream running through a village have no claim to damages,[65] because the provision of the penal code was a protection only for the deceased himself but not for his family. This decision is justly excepted to,[66] and the reason given for it, that the death of its head did not necessarily prove a pecuniary loss to the family, is also attacked with good arguments.

As to the next case,[67] it is shown[68] in substantial although not formal agreement with the views of the Court, how the reason for that decision could have been stated very simply. The decision was to the effect that where a bailee, being entitled to deposit the thing bailed or the proceeds of its sale, under the provisions of the controlling sections,[69] with the proper officer, sells the thing bailed at public auction, he may, instead of depositing the proceeds, pay it to the person entitled thereto, and in doing so satisfy any claim of his own as an offset.

The next question is whether a lessor is liable in damages, where the lessee has rescinded the lease for the reasons permitted by the Code.[70] The affirmative answer in this case does not seem to me to be so completely justified as Fuchs assumes, in accordance with the Imperial Court overruling the "Kammergericht." Precisely from the sociological standpoint, is it not unjust to make the lessor liable for all damage to the lessee even where he is not at fault when the premises become uninhabitable? Is not the gravamen in such a case the negligence of the lessor, as suggested by another

[65] Under BGB § 823, par. 2; cf. Penal Code § 367, No. 12.
[66] Comp. my observations in "Deutsche Richterzeitung," 1909, p. 100.
[67] RGZ 64, no. 90, p. 366.
[68] "R&W" pp. 40–46.
[69] BGB §§ 383, 384.
[70] RGZ 64, no. 93, p. 381; BGB § 542; "R&W" pp. 50–52.

section?[71] Yet the Imperial Court never touches upon this matter.

§ 15. *Further Criticisms.* In the next case,[72] I should be inclined to agree that one should not carry the logical deduction from a concept so far as to arrive at the utterly unsatisfactory conclusion that the purchaser of a house is obliged to tear it down because his grantor had built across the boundary line of the lot into the adjoining lot which also belonged to him. It would seem that this is a case for applying the section of the Code,[73] which authorizes the tender of a money rent in such cases.

Next, with regard to the "replica compensationis" I agree that such a plea should be admitted.[74] It would seem obvious to any unprejudiced person that where action is brought for a part of a larger demand, the defendant cannot object to having any offset on his part counted against the portion of the demand not sued for. Otherwise plaintiff would have to dismiss his action or suffer judgment, and then begin a new action for the whole claim, including the part about which there is no dispute. That is surely nothing but an abuse of process, which the court should prevent, for the law must be held to be against and not in favor of abuses.

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In the case where the keeper of an animal was sued for injuries caused by a horse to a person whom he had allowed to ride with him by way of accommodation[75] I agree with Fuchs that the Supreme Court ought to have ruled against the plaintiff. This is on the ground that obviously he would himself have thought the claim inequitable and preposterous if he had been in

[71] BGB § 628.
[72] Cited in JW, 1907, p. 301; "R&W" pp. 54–59.
[73] BGB § 912.
[74] RGZ 66, no. 62, p. 266; "R&W" pp. 61, 81, 82.
[75] RGZ 65, no. 75; "R&W" p. 67.

the shoes of the defendant. The so-called supplementing of the lacking intention of the legislator by the court[76] is based purely on fiction, while what really should have taken place here was to have the sense of justice of the court decide. In a case like this, one can hardly say that the facts were taken into consideration.

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§ 16. *A Difficult Case.* The next case considered by Fuchs[77] requires more detailed discussion in view of its difficulty. The facts were that a ten-year-old boy was employed as a laborer in a coal mine, contrary to the statutory provisions of the Industrial Code.[78] He lost several fingers of a hand in the course of his employment. The question arose: Is an employee illegally employed to be taken as insured within the meaning of the Industrial Accidents Insurance act? If so, he will receive the compensation provided by that act out of the funds of the trade association, which will not amount to very much, but he is excluded from all further claim against the employer. If the answer should be in the negative, he will retain all his claims upon the employer (who may possibly be insolvent), but will receive nothing from the trade association. In either case he is threatened with certain risks. The Imperial Court declares in favor of the principle that the first alternative is preferable, and I believe that to be correct, as far as it goes, differing from Fuchs. The proposition is presumably based on the ground, correct from the standpoint of sociology, that children suffering personal injuries in such cases ought to be protected at least to the extent of the compensation provided by the act, and payable by the association, which is solvent. In the concrete case at bar, the boy's

[76] RGZ 64.

[77] RGZ 66, no. 14, p. 42; "R&W" pp. 72 seq.; "G" pp. 49 seq.

[78] Industrial Code, §§ 135, 154a.

claim was rejected by the arbitrators on the ground that the association was not liable where the contract of employment was void for illegality. The Imperial Court, in accordance with the contrary views expressed by it, dismissed the boy's action against the employer, which had been begun in the civil court. In this connection it does not appear why section 135, par. 3, of the Industrial Accidents Insurance Act was not applied, a question which is not discussed in so much of the decision as has been published. According to that provision the ordinary courts are bound by the decisions of courts of arbitration, and it would seem that the Imperial Court should have held on that ground that the employer was liable. Possibly the Court failed to apply this section with the idea in mind that "valid judgment" within the meaning of section 135, par. 2, would refer merely to the liability or non-liability of the association, but would not dispose of the question whether the ordinary courts were bound to recognize a liability of the employer, even where according to their own view none existed, in obedience to the decision of the arbitrators. However, we could not assent to such an opinion from the sociological standpoint; for it cannot possibly be the intention of the statute that in a concrete case like this unfortunate one the person injured through the fault of an employer should receive nothing at all.

§ 17. *Further Criticisms Analyzed.* In a case where a party has refused an oath which as put comprised several distinct subject-matters,[79] there must be some way by which the court above may remedy the oversight through which the oath was refused entirely instead of regarding the objectionable subject-matters only.

[79] RGZ 66, no. 50; "R&W" p. 78.

With reference to his next case,[80] I agree with Fuchs when he says that practical considerations and equity require that the vendor of a defective article, in an action for damages, should have the burden of proof regarding any defenses he may have, so that the "legal deduction," on which the Imperial Court expressly relies, ought not to be decisive.

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I now proceed to a consideration of the decisions criticized by Fuchs in another work.[81]

Touching the first case,[82] I agree that it would be more correct to deny the right of claiming a reduction of the purchase price to the guarantor, where the vendee either cannot or will not demand such reduction. There is no logical necessity growing out of the concepts of rescission of a sale or demand for a reduction of price, for making a distinction in the relation of the principal debtor to the guarantor.

Referring to the next case,[83] one feels disgusted at the doctrine that a man who has been declared the father of an illegitimate child is not allowed to interpose a defense [84] in an action by the child through his guardian, for maintenance and support, where the mother had been subsequently convicted of perjury, but the man had failed to bring an action to set aside the judgment declaring him to be the father. In this connection we may call attention to the more correct view taken by the First Criminal Division, to which prior decision,[85] however, the Sixth Civil Division makes no reference. "No matter how high one may rate the sacredness of a judgment,

[80] RGZ 67; "R&W" p. 82.
[81] "G" ch. 2, pp. 27 seq.
[82] RGZ 66, no. 80; "G" p. 27.
[83] RGZ 67, no. 43; "G" p. 29.
[84] Under BGB § 826.
[85] RG Str 34, 282, 283.

it must not be allowed to shield the wickedness of criminality."[86]

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The decision next brought under consideration[87] is more in harmony with the strict rules governing negotiable instruments, it seems to me, than the opposite views of Fuchs. It was possible for Adolf M. to bind himself personally. The fact that the note was intended to bind the firm known as Adolf M., of which Adolf M. personally was the attorney in fact, should have appeared on the instrument itself.

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The distinction relating to signature by an attorney and by a mere amanuensis mechanically adding the subscription which Fuchs criticizes in his book[88] is well founded in the statute.[89] Even though in the latter case signature by an amanuensis were permissible, nothing would indeed remain of the requirement of "signature in his own hand," required by the section of the Code.[90] Such distinctions, though at first glance they may surprise us, are not to be avoided in any body of law.

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§ 18. *The Subject Continued.* It is shown[91] how, by means of the "constructive and dialectical" method, actually two views diametrically opposed to each other may be "proven." In this case a creditor accepted the substitution of the purchaser of mortgaged property as a personal debtor, although the reference to this transaction had not been entered on the record of conveyances, as required by the section of the Code.[92]

[86] "G" p. 30.
[87] See "G" p. 33, citing from JW 1908, p. 280.
[88] "G" pp. 41, 42.
[89] Where a writing is required, see RGZ 50, pp. 51, 81, 387.
[90] BGB § 126, par. 1.
[91] "G" pp. 46, 47; cf. also p. 44.
[92] BGB § 416, par. 2.

There are two contradictory decisions of the Imperial Supreme Court.[93] Nobody is likely to deny that the second of these decisions is obviously correct and might easily be justified in two simple, easily understood sentences.

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I agree again, however, with Fuchs in his criticism of another decision cited.[94] I cannot believe it to be good law when the will of the paralytic widow Schmidt is declared invalid because the judge before whom it was made had not required her expressly to state that she could no longer write, as I have already said. I also am of the opinion that this is a most extraordinary exaggeration of the blind respect for forms, and shall reiterate, notwithstanding adverse criticism, that a decision like this impresses one as inhuman. It seems, by the way, as if the decision had met with universal dissatisfaction.[95]

On the other hand I am not on the side of Fuchs in his animadversions on two other Imperial Supreme Court[96] cases. In the former case I cannot believe it to be good law to extend the sociological reasons which make the maxim that "purchase destroys hire" inapplicable to the rent of a dwelling, also to the case of leasing hunting rights, which is a contract of a very different nature. In the other case I am of the opinion that a counter-complaint in a separate action is not admissible at all in cases where damages are sought for execution on a judgment which was afterwards set aside, when the section[97] of the Code of Civil Procedure gives a special remedy in such cases. For this reason the point

[93] Gruchot's Beiträge 49, p. 354; RGZ 63, p. 42.
[94] "G" p. 277; RGZ 68, No. 79.
[95] Comp. *Danz*, in DJZ 1909, pp. 100, 101; *Hellwig*, ibid. p. 426.
[96] JW 1909, nos. 12, and 22; "G" 304, 295.
[97] 717, par. 2.

that the counter-complaint involved a larger demand could not be relevant.

It would seem that anybody who has painfully worked himself through the artificial reasonings in the decisions of the intermediate and supreme courts, and then finds in the appendix to Fuchs' book the solutions of these problems in the spirit of sociology,[98] would become imbued with the enlivening hope that at last common sense, which has so often knocked at the gates in vain,[99] will enter triumphantly into the temple of Themis.

Regarding what Fuchs calls a "decision professorial and assessorial" reprinted as an appendix to his book[100] we shall have to admit frankly that in a day not very remote it will be fit for exhibition in a museum of legal curiosities as a fossil relic of a method long since supplanted.[101]

The "scientific" decision of the Ober-Landesgericht [District Court of Appeals] I consider erroneous, as Fuchs also regards it.[102] If anybody offers a thing for sale on the express condition of cash payment, no set of circumstances can justify a judgment forcing him or his successor in law to part with the goods without such cash payment. It is impossible that a person to whom such a thing should happen should not feel that he was being robbed under the forms of law, no matter what learned arguments may support such a decision.[103]

[98] For instance, page 308, referring to JW p. 55, par. 25, and other places. I should like to call special attention to the last paragraph but one on page 261, where is stated concisely and well: If a husband is capable of purchasing and paying for land to become part of the community property, he must also be capable of giving a mortgage as security for the purchase price.

[99] Common sense in matters of law and true subjective sense of justice are synonymous terms.

[100] Appendix II, p. 266.

[101] It should be observed, however, that this judgment was reversed by the Appellate Court at Karlsruhe.

[102] See "G", Appendix II, p. 271; "G" p. 321.

[103] "G" p. 321.

In the present case the facts would entirely justify the assumption that the delivery should take place on payment of the balance still due, and that before this was done there was to be no transfer of title. Such an assumption would have been in harmony with the actual circumstances and would have prevented the inequitable result of the action.

§ 19. *The Supreme Court Sometimes Sociologically Correct.* The character of the list of cases Fuchs criticizes adversely might create the impression that he is inspired with a hostile animus, and as a matter of fact that charge has been made against him. I believe that there is no ground for this. Fuchs gives high praise to the German judiciary in general[104]; and where he finds sociologically correct judgments he calls special attention to them with evident pleasure. All correct decisions were found without idolatry of the letter, "contrary to mechanical pandectology, which means in harmony with a feeling for justice unhampered by traditional routine, and with an understanding of the subject-matter."

As illustrations of this proposition I may myself call attention to the feeling of relief created by such decisions as that in which the court held the restrictions on their liability which the management of the Kiel Canal had, in the interest of the Treasury, imposed on ships passing through the canal to be illegal exploitation of a monopoly.[105] Similarly, I call attention to a number of decisions in which various commercial abuses were held improper, such as the commingling of goods with others of inferior or worthless quality. In the matter of practice and procedure also, the Imperial Court has reaped its brightest laurels in those decisions which make for

[104] "G" p. 28, 8.

[105] RGZ 62, 266; 68, 358.

a thorough investigation of the facts, such as where it insists on the exercise of the duty of the judge to interrogate witnesses (section 139, Code of Civil Procedure)[106]; or when it carries on a persistent warfare against recurrent attempts of the lower courts to restrict the right of submitting evidence.[107] Thereby the Court supported a truly sociological idea, to wit: the primary need of thoroughly mastering all the facts, against the resistance of legal formalism.

§ 20. *Individual Errors or False Method.* I believe that this detailed reëxamination of the cases commented on by Fuchs affords a sufficient basis from which to proceed toward the solution of this question:

Is this simply a matter of individual erroneous decisions among the judgments of the Imperial Court (numbering about 2500 annually), and is the same thing true of the numerous decisions of the lower and intermediate courts, which Fuchs in accordance with the Imperial Court considers erroneous?

To this question the answer must be in the negative. The whole method involved is faulty. This false method is exhibited in all cases in which unsatisfactory and, to use plain terms for the sake of truth, unjust judgments were rendered. In all such cases we can find the invariable characteristic that decisions are based on doubtful arguments drawn from the letter of the statute or an artificial, abstract deduction, while reasonable inferences from the concrete facts, equity, and the subjective sense of justice were neglected.[108] For where a mere reading of the opinion, as is the case in not a few of the decisions

[106] This is called one of the shining examples of how the Imperial Court administers the law in: *Schneider*, "Die richterliche Ermittlung des Sachverhalts," 1888, p. 109.

[107] The Imperial Court has "insisted on this constantly in a most meritorious and intelligent manner"; *R. Schmidt*, "Lehrbuch des Zivilprozesses," § 72, ii, sub-section 2.

[108] Comp. below, sec. 22.

cited, causes a feeling of annoyance, pain or indignation, one may rest assured invariably that interests entitled to protection have had to give way for lesser interests on the opposite side, or that they have been sacrificed to legal technicalities. In all these cases a more liberal interpretation of the statute, the omission of unreal, abstract argumentation, the weighing of interests in accordance with the manner in which the business world looks at these things, and lower value put on technicalities would have given the victory to the just claims of the parties.

Thus we must recognize that it is vain to hope that mere abstract knowledge of laws and statutes and their purely abstract application will suffice. In that way we shall miss the true mark, and substantial justice will be wounded a thousand times. Nothing can come of it but fatal error repeated again and again with a certain appearance of right.[109]

It follows that the essential element in the administration of justice is to be sought in a place different from that in which it has been looked for in the past. The very kernel of the work of the judiciary lies in the just government of the real interests and possessions of human beings. The scholastic and dialectical method prevailing to-day, attempting as it does to draw the decision as logical conclusion from the legal rule, by means of verbal interpretation supplemented by purely verbal inferences, without proper weighing of conflicting interests and without considering whether the result will be reasonable or not, is decidedly wrong. Unless we realize that it is the business of courts to serve the interests of actual life and to adapt their judgments to them, instead of forcing the facts into a bed of Procrustes

[109] *Fuchs* may rightfully claim the merit of having given brilliant proof of this by his inductive method.

according to some schematic formula, we are on the wrong road, and we shall err fatally in imagining that we can ever obtain certainty of the law in this manner.

§ 21. *The Prevailing Method not Working Properly.* For nothing is more certain than this: all the decisions we have referred to as substantially unjust are supported by undoubtedly acute legal arguments that cannot be gainsaid from the standpoint of formal logic.[110] This fact proves that the prevailing method of finding the decision by logical deduction from the legal rule does not work properly. It seems to be an open secret that in the majority of cases we can support both sides of a contention by deductions and constructions drawn from the rule by faultless logic. In courts composed of several justices, where the decisions are notoriously often adopted by a mere majority vote, "the defeated minority could support the opposite decision by drawing from the rule pandectological arguments that would be quite as beautifully logical." If that is admitted, it is quite possible to come to the conclusion that our decisions are "accidental products of juridical construction."

The courts must therefore make it clear to themselves that they are deceived when they take comfort, as they have done in the past, in the fact of having deduced their judgment by formally correct conclusions from legal rules. They should know that the sense of justice of our age, sharpened as it is by social and sociological ideas, demands first of all a just decision, found by the balancing of the substantial interests involved, so as to regulate and govern the legal relations submitted to the judges in a reasonable and comprehensible manner. Such order can be brought out of confusion by no judge

[110] It is even true (see "G" 146, 147) that judgments wrong and unjust from the sociological point of view are supported by greater deductive acumen than those sociologically correct.

who fails to seek first of all what is just, subject to the controlling function of the positive statute. "The certainty of the law is not determined by pandectology, which is little more than a lottery, but by the personal character and substantial experience of the judge."[111] To eliminate the full influence of the judge's individuality in favor of a phantom of certainty and equality is contrary to the nature of law, turns the administration of justice into mechanical machinery and renders it unadapted to real life."[112]

§ 22. *The Sense of Justice.* Yet it is held pretty generally, at the present time, that the individual sense of justice is an inadmissible and unprofitable factor in the administration of law. Sense of justice is identified with arbitrary will, and it is denied more or less emphatically that this can become the proper basis for a judicial decision.

To deny the existence of a subjective or individual sense of justice would be to contradict all experience. Such a sentiment exists as certainly as does conscience, with which it is allied by many essential features. Long ago the Romans knew that this feeling may be increased and strengthened by practice and training. That is why they spoke of "constans et perpetua voluntas jus suum cuique tribuendi." How absurd, however, to eliminate this feeling from the very place where it is especially fitted to exercise its function! Of all places, from the heart of the judge whose calling makes it his duty to cultivate and develop this feeling in himself! Do not all men in ordinary life draw their conclusions as to what is just from this inborn sentiment in a million cases which are never submitted to a court and which form by far the greater portion of the facts to which law

[111] "G" 84.

[112] "G" 188, 189.

and justice is applied? Does a well-disposed layman, in attending to his affairs, ever consult anything but his experience, his common sense and his conscience, which we all know speaks in plain language to him who stands at the parting of the ways?"[113] Yet will it be said that as a matter of principle the judge is obliged to act differently, the judge, whose business it is, as Klein says, to tell the parties what they ought to have done before they came into court?[114] Is there really an insuperable barrier between doing business under the law and the rendering of judgment on the law? Can it be that the function of the judge is not to regulate the working of the law in actual life according to the nature of legal life, but to impose upon such legal life something alien to it, discovered in the statute by means of speculation and abstract argumentation? Are not the laws supposed to be merely the formal expression of the manner in which economic and social intercourse is reasonably carried on? Was there not bartering and selling before there were statutes prescribing what duties were to grow out of such transactions for the participants?[115] Was Zeppelin to defer the conquest of the air until aërial traffic had been regulated in neat little rules and sections?[116] Where is the judge to find decisions for conflicts arising out of relations not regulated by statutes, if not in natural equity in the light of a fair balancing of the interests involved?[117] And how are you going to eliminate the

[113] Comp. "G" 11.

[114] Ibid.

[115] Comp. the excellent passage in the report ("Motive") on the bill to regulate the relations between authors and publishers (Act of June 19, 1901), where *Danz* says (p. 24) that the bill did not intend to create new law but merely to recognize and affirm the practice already prevailing. That is the true type of the growth of law.

[116] "G" 58.

[117] It is true, however, that equity must be distinguished from subjective sense of justice in so far as it represents the general sense of what is just. This has led *Schmölder* ("Die Billigkeit," p. 35) to treat equity as

natural sense of justice where the statute expressly refers to it, as it does when it speaks of "weighty reasons," "good morals," or "good faith"? What blindness, to demand of the judge that he forget his subjective sense of justice! No, indeed! Unless one is ready to involve himself in absolutely monstrous and insupportable inconsistencies, he will have to recognize that the court must as far as possible declare the law to be as people would naturally do in their daily intercourse; in other words, he must call to his aid the subjective sense of justice.

There is another reason why this should be so. This manner of finding the law, which appears so strange to the learned judges, is already applied to a very considerable extent in the lay courts recognized by law. As a matter of fact a lay court is quite sure always to ask itself first, what would be done in any given case by a sensible person called in to act as a peacemaker trying to be fair to both sides; after that it will consider whether the statute will permit them to render a decision accordingly. In the commercial courts, where I have experience, the presiding judge will hardly do otherwise if he means to convince the lay assessors of the correctness of the decision. If it is claimed that the administration of law as thus carried on in the lay courts is

synonymous with popular sense of justice. Afterwards, however, he recognizes expressly (p. 56) that equity substitutes the "pleasure" ("placitum") of the individual judge for formulated rules. Hence must follow that a certain degree of subjective discretion on the part of the judge must be conceded if equity is to remain a factor in the administration of justice. For without such discretion one could not know what is equitable. To eliminate equity from the "ars boni et aequi" is simply unthinkable. In discussing the subjective discretion of the judge we must not forget that his knowledge of the whole body of law and the interdependence of its parts (say, e.g., with regard to the utility of prescribed formalities and the necessity of enforcing them) will so vitally affect his original sense of justice that a new and peculiar condition of his mind is the result. Of this condition the judge could not rid himself in any particular case, even if he wished to do so, any more than a medical expert, in testifying, could eliminate his knowledge of medicine.

wrong in principle, we shall have to maintain that in Germany there are two ways of rendering justice, one of which is utterly irreconcilable with the other.

§ 23. *The Theoretical Conception of Judgment.* Besides the formalism which would eliminate the sense of justice and simply subsume the matter to be considered under some statutory provision, another factor plays its part in exerting a considerable influence on the formalistic method. That is the theoretical conception of a judgment in civil actions.

Commentators on procedure usually have little to tell us about the nature of a judgment, except that a judgment is the "final decision rendered by the court after an obligatory oral trial." The prevalent idea regarding the substantial nature of a judgment in a civil action is that the judge has to "bring the case under the statute," to subsume it. Following Savigny, we are taught that a judgment is a syllogism wherein the legal rule is the major premise, the facts the minor premise, the decision the concluding member. In practice, at least, we have never progressed beyond this point. The idea seems to be: if we have established the facts and found the proper rule, the decision will spring up of itself, so to speak.

A judgment is conceived to be declaratory in its nature. According to Gaupp-Stein,[118] a judgment is "a declaration stating what is the law as applied to a state of facts and the condition of an action," and it is said to be "but seldom" that the "decision is at the same time imperative as to what shall be the legal relation of the parties — meaning, in the latter case, so-called constitutive actions [i.e., actions in which a judgment is sought that merely declares what the duty of the defendant is toward the plaintiff as, for instance, actions simply for an accounting, for restoration of marital rights, etc.].

[118] "Code of Civil Procedure": introduction to section 300.

Now here, in my opinion, we have before us one of the fundamental troubles under which our system of administering justice is laboring. The assumption that the decision is, in its essential nature, equivalent to a logical conclusion is erroneous.[119] The decision and judgment is not merely a logical conclusion; it is also an exercise of the power of the State in the interest of keeping the peace under the law. The judicial determination has under all circumstances the characteristics of an act of will on the part of the State and consequently it must necessarily be a command, for the reason that one cannot conceive of acts of will under the authority of the State except under the form of commands. This is clearly seen by Fuchs also: "The traditional conception is that the judge first formulates the major premise from the statute and its interpretative materials; next he subsumes the state of facts under this rule, and finally he deduces his decision as the logical conclusion. If we recognize the lack of truth and reality in this scholastic tradition, we have comprehended the whole essence of the inductive method in the administration of law."

However, by this very conception of the nature of decision and judgment which we have characterized as being erroneous, one is scarcely less than compelled to rely, in a manner not justified by reason, on the dialectical method. It is very different when one conceives of judicial determination as a command or an act of will by the State. That cuts off at once the possibility of deducing this will dialectically from the rule of law. In this way, however, the importance of the formulated rule is restricted, without further difficulty, to the limits imposed by the nature of the subject. The judge,

[119] Comp. *Bülow*, "Gesetz und Richteramt," Leipzig, 1885, pp. 5 seq.; *Gmelin*, "Die Vollstreckbarkeit," Tübingen, 1898, p. 48. See also "R&W" 81, where judgments are defined as "authoritative categorical declarations"; and "G" 35.

in trying to find the correct decisions, can no longer start from the idea that somehow there is concealed in the facts of the case a rule the counterpart of which he must find in the provisions of his Code. He will feel instead that his task is, by an act of will, to regulate the exercise of the mutual rights of the parties and to make a just distribution of the property in question. He will remember that he is there to help the parties to achieve the purposes for which their various transactions were undertaken, so far as these purposes are not disapproved by the law, and to give to parties whose rights have been invaded without any act of their own such protection as they are entitled to in the way of a reasonable and just regulation of their interests. The first thing required, therefore, is to direct the will of the judge to the reasonable and just result within the limits of the positive rule of law.[120]

§ 24. *The Balancing of Interests.* Here is where the balancing of interests by the judge comes to his aid. This is no imaginative thing but a substantial reality. For the things to be weighed, the material interests, exist and are easily understood if one's mind is directed toward them. This balancing of interests will furnish the solid basis for the subjective sense of justice that is to guide the will. The balancing itself is in turn, to a great extent, aided by the general manner in which the business world looks upon the subject. In those cases, however, where the business world has not yet formed a general opinion upon a subject, it will be the function of the judge to create such an opinion and to give it the form he would give it if he were acting as legislator.[121]

[120] We do not fail to see that in the case of a very simple state of facts there is no room for discretion as long as the court remains faithful to the words of the statute in the measure advocated in the text.

[121] In a number of decisions of the Imperial Court, notably in the well-known decision of Nov. 2, 1907, regarding the retention of title in

The subjective sense of justice will, accordingly, find substantial support in the actual rights and interests of parties in the habits and opinions of the business world, and the needs of human intercourse. The courts themselves will concede that much greater authority should be attributed to a sense of justice supported by these material factors than they have ventured to do in the past. They will feel at liberty to find their proper functions in something else than an anxious search for legal principles supposed to be concealed in the facts of the case.

The whole of the judicial function has accordingly been shifted. From the standpoint we contend for it appears like the following: The will of the State, expressed in decision and judgment, is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless a positive statute prevents it; and in weighing conflicting interests the interest that is better founded in reason and more worthy of protection should be helped to achieve victory.

§ 25. *The Need of a Change in Attitude.* If the conception of judicial functions outlined above is in line with what Fuchs is aiming at, as I do not doubt that it is, although he may not yet have expressed it in this form, then I do not hesitate to declare that the

machinery, this point of view is not understood, and instead the court tries to discover what the general popular custom is regarding a subject on which there is no such popular custom.

results of this reasoning point the way toward a complete revolution in the theoretical notions now prevailing regarding the judicial function in civil actions, and consequently in the practical administration of the law.[122]

If the views here maintained are correct, it is time we should get rid of the attempts, now shown to be fruitless, to deduce the decision dialectically from the formulated rule. The place of these attempts will be taken by proof that the decision is within the formulated rule, but this proof would become the second step, while at present the deduction from the rule is the first step in the mental process. Instead of that, the grounds of decision will hereafter prove (and one is tempted to say that this involves a shifting of the burden of proof which now rests on the writer of the decision) first of all that the distribution of property and rights, as contained in the judgments, is in accordance with right and justice. It is to be just in this sense also that the decision, in case the matter to be decided is a type of similar cases, must be fit to constitute a rule for future cases of the same kind. In this view of the matter, however, the statute or rule retains its authority to this extent that the judge must show that what he wills and commands is within the limits of the positive statute, that the rules applying to the matter do not necessarily require the opposite decision, and that the decision does not, accordingly, violate the law within the meaning of section 549, Code of Civil Procedure.

§ 26. *Objections to the New Method.* Does not the new method, however, imperil most seriously the certainty of the law? That question I shall answer by the counter-question: Does such certainty exist at present?

[122] We shall have to contend that this conception is a new one until it is shown that conscious sociological methods are in practical use by the courts even now.

"It is plain to be seen that nobody can know what his rights are if the courts go on supplementing the statutes in the manner they are doing now." "Anybody unfortunate enough to fall into the clutches of a fanatic for logical deductions and legal fictions will find that a lawsuit is purely a lottery." "It is possible to 'deduce' all sorts of legal results, which may be wholly inconsistent with each other, out of the same state of facts, because the selection of a starting point for the process of deduction is not hindered by any regard for realities." He who says these things is not even that terrible fellow Fuchs, but a German university professor, Ernst Stampe of Greifswald,[123] whose good intentions nobody can deny, and who yet demands earnestly that interests be balanced on a sociological basis. To be sure, he must admit that the ears of the practitioners have up to this time been deaf to all such demands. "Many of our practical friends are loath to give up their pleasant walks in the paradise of legal abstractions, where they can pick up without trouble a nosegay of concepts from which to 'deduce' any sort of decision. They decline to taste of the apples from the tree of social knowledge. They murmur when the scales of Justice are to be used in the prosaic business of weighing interests."[124] Well, I believe that the deaf ears of practitioners may be opened to an appeal pronounced with the power of united voices. If Fuchs as the champion has cried too loudly in the turmoil of our age, he may be excused on account of the indifference which all great problems encounter in our day.

[123] In his paper on "Unsere Rechts- und Begriffsbildung," Greifswald, 1907, Abel, pp. 6, 37. He names among his precursors, expressing similar ideas: *Jhering*, *Baer*, *Bülow*, *Rümelin*, *Meili*, *Schlossmann*, and especially *Heck*, and *Ehrlich*.

[124] Says *Stampe*: "If the Imperial Court were to incline frankly toward this method instead of using its great skill and experience to promote the habit of abstract scholasticism, the most beneficial consequences would soon be apparent."

We cannot gainsay Fuchs when he calls on "all his colleagues at the bar from Königsberg to Colmar" to be his witnesses for the prevailing uncertainty regarding the outcome of any lawsuit about to be instituted. Such uncertainty is bound to grow up while a method prevails, as we have shown, in our administration of justice, by which, more or less consciously, mere system-building and formalism become paramount. In the course of that method, unjust, inequitable results necessarily flowing from the dialectical method are accepted as matters of course, for formalism and lack of feeling are notoriously allied. In the light of my own experience I cannot hold Fuchs to be wrong when he asserts[125]: "The latter-day judge is not surprised at any result, on matter how inequitable; on the contrary, especially if he can find a few precedents, he comes to believe that even the most unjust decision is right."

Any one of us judges who has occasion in some matter to venture a prediction regarding the outcome of a lawsuit will, in view of the flood of doubtful points existing to-day, feel himself overwhelmed by a feeling of uncertainty.

§ 27. *Some Objections Refuted.* My own discussion of the decisions criticized in Fuchs's books has shown, no doubt to the great joy of adherents of the old school, that differences of opinion regarding particular cases are quite possible even from the sociological point of view. It is true that "Even under the sociological method decisions will not be produced automatically." In the first place, however, it is fair to assume that in innumerable cases it will be easier to reconcile the opinions of the members of a court if the whole bench tries earnestly to put into effect what is equitable and just than if they indulge in fruitless wrangling about learned

[125] "G" p. 159.

concepts. "Between different points of view regarding the act of a party, between differing appreciations of the good faith and merits of an action, it is possible to find a middle line. The severity of one judge may be tempered by the fairness and kindness of another. In proportion as a judgment is to be based on legal tact, a sense of morality and the instinct of long experience, each judge will become more tolerant of the differing opinion of his neighbor on the bench. Conversely, pertinacious, stubborn maintaining of one's own opinion is natural where one has arrived at his results purely by a reasoning process, so that any concession would involve the admission that the reasoning of the other was better than one's own." Again, we find a powerful ally in Mendelssohn-Bartholdy, who is the author of the following:[126] "In the sociological contest, the most reasonable, respectable, and appropriate solution will prevail in most instances, while in a pandectological disputation the most unreasonable and impractical solution has just about an even chance with its opposite." It is perhaps not going too far if one asserts, in view of the positive material submitted, that it is henceforth impossible successfully to contradict the above statement.

We may assume as certain that definite guiding lines will gradually develop as the sociological method becomes more familiar. My own opinions in that respect I may briefly state as follows: We should get to the point where the proper task of a judge is generally considered to be the just distribution of property and rights among the parties, and where it is no longer held sufficient if the decision appears as a formally correct logical deduction from the statute. We should rather demand that the decision will stand as a just judgment, both "in foro

[126] In: "Das Imperium des Richters," p. 115, Strassburg, 1908, Trübner.

interno" of the judge, and in the estimation of the persons concerned.[127]

The idea that decisions based on purely dialectical argumentation have the alleged quality of logical necessity is a figment of the imagination. The writer himself used to believe this, but I now renounce any such opinion. We shall have to get along without the pretense that our decisions are logical necessities. Judges should be as independent as possible both of precedents with the deductions therefrom, and of the artificial deductions of jurists.

§ 28. *Some Opinions Regarding the New Method.* The task remains of surveying the reception hitherto accorded to the new ideas.

In an ingeniously and cleverly written article recently published,[128] Vierhaus attempts to describe the school of free legal decision as one of those symptomatic manifestations of the time which, whenever they find some defect in an existing institution, at once reject it utterly without supplementing their negative criticisms by positive proposals. He is sufficiently acute and fair to recognize, behind what he calls "the grotesque Capuchin harangues" of Fuchs, "the eye of a sharp observer" and "the countenance of a warm idealist, for whom true justice is a matter of the heart." Vierhaus thinks that Fuchs has transgressed the due bounds which even the most earnest controversialist should observe, but he deems the substance to be of more importance than the form. Superficially, he seems to take about the same point of view as we do here, but substantially he differs in all respects. As I view the matter, it is by no means true that the sociological method lacks a positive content, and I cannot agree with the prevailing opinion

[127] "G" 73, 236.

[128] In DJZ 1909, p. 1169.

which Vierhaus also adopts, that the whole quarrel is merely about particular legal provisions, particular juridical doctrines, particular decisions of the courts.

Vierhaus may be taken for a typical representative of the theory of subsumption, for according to him "the legal concept and the legal rule are to be laid upon the state of facts, so to speak, in order to see how far they cover each other"; and further he says that "the function of the judge is at an end when he has correctly subsumed the correctly ascertained facts under the correct rule," while in his opinion "a legal science operating with an indefinite sense of justice not capable of expression in logical terms would not deserve the name of a science." We, however, are of the opinion that we dare no longer refuse a place in the administration of law to the subjective sense of justice, even if perhaps it is "hard to express logically," by the side of the science of logical concepts. By the way, what may the δαιμόνιον which Vierhaus also speaks of, be if it is not this very feeling? We shall try to discover whether it may not be possible to find firm bottom for this sense of justice in certain "realities" (as we have attempted to explain above).[129] Reading in Vierhaus's article how, as a result of the free decision doctrine, the judge is to be helplessly exposed to the influences of economic, social, and political controversies, instead of being protected by "the brazen shield of the law," one is indeed tempted to reject the new theories. However, it cannot be denied that even to-day the judge cannot really escape the necessity of making up his own mind regarding certain economic questions, as for instance the propriety of "cartels," boycotts, and the like. That being so, it would seem better to face this necessity with conscious frankness than to hide behind insincere scholastic arguments.

[129] Sub tit. iii.

Vierhaus himself advocates the balancing of interests; he fails to realize, however, that this point of view cannot possibly be reconciled with what he calls "absolutely the only possible method of jurisprudence, the deductive method which has been tested during two centuries." For according to this method the letter of the statute must be enforced, according to the logic of concept and deduction, even where a proper balancing of interests cries out for the opposite decision. We may regret it, but we must not obey Vierhaus's summons to cease from attacking the deductive method of administering justice until everybody concedes that the balancing of interests deserves the preponderance.

It is very pleasant to see how Hedemann[130] treats without bias the numerous blemishes in the form of Fuchs's comments. We cannot deny that this critic is justified in calling attention to a certain onesidedness, and the lack of concise, systematic presentation of the views stated by Fuchs. He is also right in noting that Fuchs has failed to build up the positive side of his argument. Yet, the negative labors had to come first. Doubt and criticism are the forerunners of knowledge. Hedemann considers a particular merit of Fuchs his showing how there is a hidden sociological element in the traditional form of judicial work, and says that on the negative side Fuchs has done "most excellent" work, that "his labors will produce rich and lasting fruit."

§ 29. *Views of Düringer.* Düringer[131] is of a very different opinion. He has no use for those who are imposed upon by phrases such as "sociological administration of justice," or "cryptosociological." Well, I surmise that Hedemann, myself, and a good many other judges, whose eyes were opened by Fuchs regarding

[130] "Archiv f. bürgerliches Recht," vol. 34, pp. 116 seq.

[131] "Das Recht," 1908.

"cryptosociology" and similar monstrosities, will console each other for having lost Mr. Düringer's favor. "Solamen miseris socios habuisse malorum." Where Fuchs refers to the assent, he has found from many quarters Düringer speaks of "a judge here and there of some district court or court of appeals" who is "delighted to see some other court of appeals or the Imperial Supreme Court catching it." Conscious that I myself do not harbor such malicious feelings, I am not capable of assuming that they inspire other judges who have the same scientific opinions as I, unless I see proof that such feelings exist. Let us wait and see whether the public will like the way in which Düringer, although expressing his appreciation of the idealistic and noble intentions of his antagonist, descends to personalities by punning on his name (Fuchs = fox). Thus he calls him a "cunning fox," or speaks of "the fox preaching to the ducks." Again he speaks of him as "the little high priest of free decision from Karlsruhe," and as "the clown with all the modern notions." In one place he does not even scorn to attack him because he is a Jew. I doubt whether he will gain applause that way, especially as so capable a critic as Vierhaus in the article cited has already suggested that it would be better if this part of Düringer's paper had never been printed.

As to the merits, Düringer's polemics do not carry conviction. He has omitted the preliminary labor of reëxamining the decisions of the highest court which Fuchs has criticized because, as he says, "he is not inclined and has not the time unofficially to wrangle about the correct decision of judicial cases." Although he has to make admissions on nearly every page, yet, according to Düringer, there is really no need of doing anything except to sing the praises of things as they are. "The most important business of the judge is to adapt the

legal rule to actual life," he says, "and as a matter of fact, that is what is being done." If that is so, we need add nothing but "Quod erat demonstrandum."

According to Düringer "the greatest of sociologists" is the legislator, and yet it would seem to be indisputably true that large portions of the Civil Code are nothing but scholastic and deductive. The one little drop of sociological oil with which, as it is said, the Code was anointed hardly suffices. To be sure, Düringer does not approve of two of the worst decisions, the case relating to the will of the widow Schmidt, and the other, commented on in the above discussion. This being so we may assume that a good many other decisions would not have come up to Düringer's standard of justice any more than to that of other critics if he had not disdained to "wrangle" about the correctness of the decisions analyzed by Fuchs. Finally, no matter how he may try to justify himself, Düringer's notorious question, "What has sympathy to do with the work of the highest court of appeal?" will be remembered by scientific investigators as a demonstration how lawyers of the school at present in the ascendancy care everything for formal logic and nothing for the sense of justice, and how they are trying consciously to banish the judge's subjective sense of justice from the court room on the plea that it leads to uncertainty of the law.

From what I have said here, and for that matter from what I have published before, it would seem to be clear that Düringer's appeal to the "esprit de corps" of the German judges as against the attacks of Fuchs will appear to me and a good many others as nothing less than demanding "a sacrifice of the intellect." I repeat that every judge will find a reëxamination of the Supreme Court decisions criticized by Fuchs exceedingly instructive and productive of good by widening his outlook immensely.

§ 30. *Views of Other Law Writers.* Hellwig [132] charges the prevailing manner of administering justice with inclining towards formalism and lack of freedom. He charges it with "forgetting frequently that its business is not simply to deal with logical categories or to enforce principles," and demands that the administration of law shall henceforth "satisfy the needs of the present by appreciating fairly the claims of contending interests." He holds that decisions contrary to this principle are contrary to the spirit of the law. "They are unjust. They violate a healthy sense of justice, no matter by what amount of formal acumen they may be defended." That must be called true sociological thought — if Düringer will pardon this expression!

I beg to recall once more Bozi, who shows by truly scientific arguments how the prevailing legal thought of our time, especially in criminal cases, is purely scholastic and formalistic. Thus it has happened that a murderer has escaped all punishment for no reason but that the logical concept of "acquittal" had to be upheld. He had been prosecuted under section 139, Penal Code, for not reporting that a crime was about to be committed, and the court, in dismissing the charge, stated expressly that this was done so that a new prosecution might be instituted for murder. The Imperial Court held that the two crimes, failure to prevent a murder and the murder itself, were both constituted by the same state of facts, and consequently there had already been a prosecution based on the same facts. Certainly the veriest idolatry of logic! An analogous case may be found in the decision where the defendant was held guilty of repeated theft, although the first "conviction" of the defendant, who was then a minor and was reprimanded under section 55, par. 1 of the Penal Code, was admitted to

[132] In "Der Tag," nos. 240, 241 (October 23, 24, 1909).

have been erroneous.[133] Of course the sacredness of the legal concept of "conviction," as shown by the record, had to be preserved against mere substantial justice!

Is this idolatry of the letter, is it legal scholasticism or is it not? Fortunate is he who is capable of consoling himself with the adage: "Tout est pour le mieux dans le meilleur du monde." Surely, those who cannot do so deserve to be laughed at. And right here I may once more call to mind the criticism of existing methods by Stampe, referred to above.[134]

§ 31. *The Subject Continued.* It is rather significant that the "Deutsche Juristenzeitung", in its special edition on the occasion of the jubilee of the Leipzig University, deemed it worth while to devote in that number[135] not less than three articles to the modern reform movement. This is not the place to discuss these articles in detail, but I should like to quote the appreciative words Mitteis wrote regarding the new school:

"Some 'positive' jurists may be surprised if for the present I say merely that I have found many of these charges excessive and unfair. Out-and-out 'positivists' may have expected a radical anathema against such writings. But I cannot, indeed, persuade myself to take such a part. I believe it is our duty to take into most conscientious consideration criticisms which in part at least come from very well instructed and keenly observant members of our profession, for possibly we may learn therefrom where we are at fault. I also believe that there are many things to be corrected." And further on he says: "What we need is less 'jus' and more real jurists."

Recently, Professor Heck of Tübingen has also taken part in the controversy regarding the sociological

[133] RG Str 18, p. 116.
[134] Sec. 26 supra.
[135] DJZ nos. 16, 17 (1909).
[136] DJZ no. 24 (Nov. 1909).

method.[136] He declares the cardinal error of the deductive method to be that rules are deduced from concepts which themselves have been formed to contain those rules. This he calls the method of inversion. I may quote a few sentences of Heck as strong endorsements of my views:

"Technical deductive jurisprudence covers up the connection of the law and the interests of real life. The law has no purpose except to serve such interests, to delimit and balance the interests of men. The principal business of legal science is to investigate the relations between legal rules and the condition of the various interests. No rule of law has been understood and explained until the interests it represents have been understood and explained. The method of inversion fails to do this. If we consider the rule to be the logical consequence of a conception containing a command, we cannot at the same time represent it as resulting from a process of balancing the needs of the parties. . . . The attacks upon German legal science are in many respects unfair and excessive, but to a great extent also they are unfortunately justified. The decisions which Fuchs deprecates are, in a considerable measure, as a matter of fact erroneous, and they cannot be explained as individual slips but must be explained as consequences of a faulty method. The greatest guilt is to be laid at the door of the inversive method. The remedy is to be sought principally in abandoning completely and as a matter of principle the method of inversion in all its forms and with all its consequences."

§32. *Conclusion.* I believe I have succeeded in proving one thing: it is by no means true that the new school lacks the capacity for positive work. Of course a critical examination of the prevailing practice was necessary and could not fail in undermining faith in

the exclusive power of logical syllogisms to bring salvation. Yet here also the adage is verified: "Studere destruit, studuisse construit." As a product of the new ideas a significant cycle of evolution seems to have begun. In it legal science may be called upon to play a leading part, provided it shall emancipate itself definitely from the scholastic lore of existing precedents, commentaries and textbooks, while remaining within the limits of positive law. Such emancipation cannot but have in its train a beneficial effect on legislation. For future statutes will have to avoid burdening the courts with useless and empty formulas, and instead of that will aid them by promoting a comprehension of the true nature of legal rights and interests and the relative values to be attributed to them — a comprehension also of the actual human relations with which the legal rules are dealing, and an insight into the principles that guide the intercourse of men.[137] That will also have a stimulating influence upon the study of the law, which is now languishing for lack of subjects of study that are living and real. More and more we must rid ourselves of the old, formalistic, and Romanistic basis of legal study, we must vigorously protest against the utterly unhealthy preponderance of the ancient languages in the preparatory schooling of boys and young men. The egoism now cultivated in schools and universities should be supplanted by an ethical sentiment inspired by the common interests of society. The roads must be made plain for a training of our youths to be citizens of the State.

These are wide horizons for our eyes to scan. Even if at the beginning but a small portion of what we are now

[137] Judges of the present day, as *Fuchs* shows in "G" 177 and in numerous other places, are mostly mere untrained empirics in these matters, because they lack sufficient preparatory education. In my day, at least, the student on leaving the university was about in the condition a medical student would be if he had studied nothing but anatomy.

striving for as a first step should become realized, to wit: a juster and more truly popular administration of the law in harmony with the requirements of real life, even then the labors of the sociological school would not have been performed in vain. And to help toward that end I would fain invite the entire judiciary.

The sociological method is of the highest ethical significance.[138] Calling upon lawyers to emancipate themselves from an unspeakable thralldom to logical scholasticism and to substitute therefor an interpretation of the law in which sound feeling coöperates, this school represents nothing less than an appeal to the general sense of justice. It saves the Court from the spirit of servility to the letter which now predominates in the administration of justice.[139] It rids him of the burden of abstract deductions and controversies which for the most part lose all meaning in the light of the sociological conception.[140] It calls upon the judge consciously to perform an act of volition for the purpose of attaining the ideal of a just administration of the law. It restores to its proper place the subjective feeling for justice, and points out how the ideal may be reached by throwing light upon the means of its attainment. It raises the judge from his present station of a mere follower into that of a leader which is rightly his, so that he may guide us on the way toward a healthy conception of the law and its appropriate functioning in the daily business of mankind. Thus the judge will become the standard-bearer of legal evolution.

[138] "G" 233.

[139] According to *Hellwig*, in "Der Tag" 1909, nos. 240, 241.

[140] "G" 23, 228. Comp. RGZ 71, p. 196, which is entirely in accord with these views.

CHAPTER IV

EQUITY AND LAW: JUDICIAL FREEDOM OF DECISION

BY GÉZA KISS[1]

§ 1. THE FUNCTION OF THE COURTS AND THE GROWTH OF LAW. — § 2. HISTORY OF LEGAL HERMENEUTICS: ROMAN LAW. — § 3. "AEQUITAS" AND "LOGICAL EXPOSITION." — § 4. HISTORY CONTINUED: LATER ROMAN LAW. — § 5. THE MODERN PROBLEM. — § 6. THE PROBLEM OF UNPROVIDED CASES. — § 7. FREE LEGAL DECISION. — § 8. THE TRUE METHOD. — § 9. THE REASONS FOR GAPS IN THE STATUTES.

§ 1. *The Function of the Courts and the Growth of Law.* In discussing the proper method of deciding law cases, it amounts to the same thing whether we inquire into the true relation between "equity" and law, or whether we ask: What is the best method of finding the law? It is one of the excellent results of the movement for free legal decision that these exceedingly important questions have been placed into the foreground.[2] The

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This is a translation of an address delivered before the Congress of the International Society of Legal Philosophy at Berlin, May, 1910, and published in "Archiv für Rechts- und Wirtschaftsphilosophie," vol. iii, pp. 536–550. The translator is *Ernest Bruncken*.]

[2] For literature on the movement for free legal decision, see especially the data by *Hedemann*, "Zivilistische Rundschau," in Archiv für Bürg. R. 31, pp. 115 seq. and 296 seq.; cf. also: *Oertmann*, "Gesetzeszwang und Richterfreiheit" (Erlangen (34) Rektoratsrede, 1909), and bibliography in the notes, pp. 44 seq.; further: *Gerland*, "Die Einwirkung des Richters auf die Rechtsentwicklung in England," in: *Schmidt*, "Zivilprozessrechtliche Forschungen," Heft 6, Berlin and Leipzig, 1910; *Gmelin*, "Quousque? Beiträge zur soziologischen Rechtsfindung,"

juridical kernel of the subject, however, has not yet been sufficiently examined. The real problem is to explain how the law may at the same time be administered and made to grow. It is not a matter of trying to find a certain criterion for the proper boundary line between strict adherence to the formulated rule ("law") and the freedom of judicial decision ("equity"); and still less of establishing a golden rule for the art of interpretation,[3] and of reducing this to a single and fundamental philosophical principle.[4]

To say the least, it is a sign of excessive optimism to esteem the value of such a theory highly; and still more so, to expect[5] "to find by means of it the Archimedean point from which all concrete cases may be decided in an objectively satisfactory manner." It is time to realize that questions like these do not at all touch the core of our problem. An inquiry dealing in an exact manner with real matters of law should confine itself to an explanation of how it may be possible that by the adjudicatory function of the courts law can be created.[6]

Hannover, 1910; *Sinzheimer*, "Die soziologische Methode in der Privatrechtswissenschaft," Munich, 1909; *Rundstein*, "Freie Rechtsfindung und Differenzierung des Rechtsbewusstseins," Archiv Bürg. R. 34, pp. 1–40; *Meumann*, "Observations sur le système de droit privé," Genève, 1909 (cf. my review in Zentralb. R. W., Nov. 1909); *Cruet*, "La Vie du droit et l'impuissance des lois" (Bibliothèque de philosophie scientifique) 1910.

[3] As for instance: 1. *Stammler's* "social ideal" according to Kant ("Die Lehre vom richtigen Recht," Leipzig, 1902, pp. 603 seq.; further: "Wesen des Rechts und der Rechtswissenschaft," in: *Hinneberg's* "Kultur der Gegenwart," ii, 8, p. 42 seq.). 2. Hegel's and Kohler's "standard of progressive culture," as formulated by *Brütt* ("Die Kunst der Rechtsanwendung," Berlin, 1907, pp. 112, 121 seq., 129 seq.; cf. *Kohler*, "Moderne Rechtsprobleme," 1907; and recently: "Lehrbuch der Rechtsphilosophie," Berlin and Leipzig, 1909, pp. 2, 57 seq. [vol. xii in this Series]. 3. *Jhering's* concept of "law as a means to an end" [see vol. v of this Series]; in *Van der Eycken*, "Méthode positive de l'interpretation juridique," Paris and Brussels, 1907, pp. 133 seq.

[4] Comp. especially *Rumpf*, "Gesetz und Richter," Berlin, 1906.

[5] Thus, *Brütt*, "Die Kunst der Rechtsanwendung," p. 124.

[6] First shown especially by *Kohler*, "Die schöpferische Kraft der Jurisprudenz," in Jhering's Jahrbücher, 25, pp. 262 seq. *Sternberg's*

It should not bother with the principles themselves of this function. For it is universally admitted that the interpretation of the law is both an art and a science, and also that it does not follow that one who knows the principles also knows how to exercise the art.[7]

What is needed is rather an accurate examination of the manner in which the decisions of the courts and the science of jurisprudence take part in making the law grow and change. The results of interpretation, the fruits of judicial activity, should be analyzed in detail in order that we may gain a scientific comprehension of their nature.

In this way we shall necessarily arrive at the conception of "aequitas," which means those principles of unwritten law which all fruitful interpretation must call to its aid. The relation of law to equity is nothing but the relation of formulated law to the unwritten principles just mentioned, which are contained in the law as it actually finds expression in the conduct of men.

I may be permitted briefly to describe the historical development of this idea in connection with the history of the traditional principles of legal hermeneutics.[8]

"Allgemeine Rechtslehre" (Sammlung Goeschen, Heft 169, vol. 1, pp. 123 seq., and particularly pp. 120 seq.) should be specially noted; probably on account of its modest tone, this work has not been considered as it merits in later writings on the movement for free legal decision.

[7] *Regelsberger*, "Pandekten," 1, §§ 36, 145; also: "Streifzüge im Gebiet des Zivilrechts" (sep. repr. from "Festgabe der Göttinger Juristenfakultät für R. v. Jhering," Leipzig, 1892, pp. 16 seq.; comp. also *Savigny*, "System des heutigen römischen Rechts" (cited from first edition, 1840), vol. 1, p. 211: "Interpretation is an art, and it is true enough that excellent models help much to train in it," but "what has been offered as the theory of it is of a much inferior kind. It is important, therefore, not to deceive oneself regarding the value of any theory of the method of applying the law — even the best theory." Cf. further: *Pfaff-Hofmann*, "Kommentar zum öst. allg. BGB," vol. 1 (1877), 166 seq.; *Hartmann*, "Der Zivilgesetzentwurf, das Aequitätsprinzip und die Richterstellung," in Archiv Ziv. Praxis, vol. 37, 405 seq.; *Kraus*, "Die leitenden Grundsätze der Gesetzesinterpretation," Grünhut's Zeitschrift, vol. 32, 613 seq.

[8] The importance of a history of traditional hermeneutics, "of which we are in great need in these days of discussions about juridical method,"

§ 2. *History of Legal Hermeneutics: Roman Law.* In Roman law, the relation between "jus" and "aequitas" is expressed by the term "interpretatio." "We are accustomed to understand by the term 'interpretation' that function of the mind which attempts to find the meaning of a legal rule, especially a written rule; an endeavor to discover the intention of its author. The manner of 'interpretatio,' however, which is ascribed to the Roman jurisprudents was not of a character so exclusively passive, as we might say. Rather it included the task of adding to the written law what remained still unwritten, to supplement the former by the latter. They were intermediators, so to speak, between the letter of the statute and real life, and as such it was their business not to stick to the literal contents of the statute and the original intention of the legislator, but to adapt the letter to the needs of actual life and to make the application of the statute practicable."[9]

The interesting thing in this is, for us, the light it throws upon legal method. In the science of legal sources it is formally recognized that legal science may actually formulate new law, and this fact is expressed by a specific concept. For the result of such "interpretatio" is precisely what is called "jus non scriptum" in the specifically Roman sense. This form of unwritten law consists of the supplementary matter, the intellectual surplus so to speak, which was added to the written law (meaning the text of statutes) by the interpretative activity of the "prudentes."

Accordingly, the concept "unwritten law" is identified by Pomponius with that of "lawyers' law":

is properly emphasized by *Sternberg* (in Zentralb. R. W. vol. 26, p. 65); in this place, to be sure, we can, for lack of space, give nothing but the most sketchy synopsis.

[9] *Puchta*, "Kursus der Institutionen," vol. 1 (4. edition, 1853), p. 316.

"Haec disputatio et hoc jus, quod sine scripto venit compositum â prudentibus, propriâ parte aliquâ non appellatur, . . . sed communi nomine appellatur jus civile."[10]

Still more distinctly it is declared in the next paragraph that this "jus civile," which properly means the "jus non scriptum" in question, had its origin in the creative power of "interpretatio":

"Lege XII tabulorum ex his fluere coepit jus civile. Omnium tamen harum . . . interpretandi scientia apud collegium pontificum erat . . . et fere populus annis prope centum hac consuetudine usus est."[11]

And finally: " . . . . . *proprium jus civile quod* sine scripto in solâ prudentium interpretatione consistit."[12]

Ehrlich's enduring merit is to have emphasized strongly that in these places the concept of the "jus civile" proper has been defined "in a manner that cannot be misunderstood."[13] From this, then, we learn that the specifically Roman idea of the unwritten law was that it consisted "simply of the interpretations of the jurisprudents." According to the Roman view, it is nothing more than the result of interpretation of the written law.

[10] Dig. 7, 2, 2, 5.

[11] Dig. 7, 2, 2, 6.

[12] Dig. 7, 2, 2, 12.

[13] *Ehrlich*, "Beiträge zur Theorie der Rechtsquellen," I. Teil. Das "jus civile, jus publicum," etc. Berlin 1902, pp. 1 seq. But cf. also: *Jhering*, "Geist des römischen Rechts," passim; *Krüger*, "Geschichte der Quellen und Literatur des römischen Rechts" (1886), pp. 26 seq.; *Karlowa*, "Römische Rechtsgeschichte" (1885), pp. 454 seq.; *Joers*, "Römische Rechtswissenschaft zur Zeit der Republik bis auf die Catonen" (1888), pp. 71 seq.; *Sohm*, "Institutionen" (13. edition, 1908), pp. 8 seq. (The last two named begin to show the influence of Ehrlich.) See also *Pernice*, "Zum römischen Gewohnheitsrecht," Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Römische Abteilung 20, p. 151; and *Lambert*, "La Fonction du droit civil comparé," 1903, pp. 694 seq.

As a matter of fact, this notion is of Greek origin.[14] It occurs especially in Aristotle, whose *νόμος ἄγραφος* means also the lawyers' law formulated by "equitable" (*ἐπιεικές*) decisions.[15] It is very important, in this connection, to understand the conception of *ἐπιείκεια*, the Greek equivalent of "aequitas," which is nothing less than "the foundation of the whole system of law." In the meaning of Aristotle, it is "the law correctly understood and interpreted," such as is always aimed at by positive law. It also forms a principle of interpretation, for the positive law must be interpreted and conceived in accordance with *ἐπιείκεια*. The written law (*νόμος ἔγγραφος*) is the literal text of the statute,[16] the unwritten law means the perfect meaning of it which cannot be expressly set forth for each individual case.

To explain this meaning, Aristotle says "that the 'equitable' is indeed 'just' but not equivalent to the 'legal.' It is rather an improvement on the merely legally-just. The reason is that every statute speaks in general terms, yet many things cannot be expressed generally. Therefore, in matters where one is compelled to speak generally but is not able to do so correctly, the statute regards only the majority of cases, although well knowing that this is an error. Nor is this manner of speaking improper on that account, for the fault is not in the statute or the legislator, but in the

[14] Cf. *Ulpianus*, Digest 1, 1, 6, 1.: "Hoc igitur jus nostrum constat aut ex scripto aut sine scripto . . . ut apud Graecos: *Τῶν νόμων οἱ μὲν ἔγγραφοι οἱ δὲ ἄγραφοι* . . . "; similarly, Inst. 1, 2, 3.

[15] *Hirzel*, *Ἄγραφος νόμος*. (Abhandl. der philologisch-historischen Classe der Königl. Sächsischen Gesellschaft der Wissenschaften 20, 1. Leipzig 1900); same, "Themis, Dike und Verwandtes," Leipzig 1907, pp. 359 seq.; *Cathrein*, S. J., "Recht, Naturrecht," etc. (1901), pp. 101–102; also *Voigt*, "Das jus naturale," vol. 1, pp. 127, 175, 529, and vol. 4, p. 372; *Pernice*, "Parerga," Z. Sav. f. Rg. 22 (1901), pp. 82–95; *Kraus*, Grünhut's Zeitschrift, 32, p. 613.

[16] Cf. *Aristotle*, "Rhetoric," A. 10. 1368 b7, A. 13. 1373 b4; and especially "Nicomach. Ethics," E 14, 1137.

nature of the thing itself." Then he adds: "Now, where the statute reads generally but a case comes up that will not fit into these general expressions, one proceeds quite properly if, wherever the legislator has failed to provide therefor and by his general expression has committed a mistake, one corrects the omission in such a manner as the legislator himself would speak and legislate if he were present to witness the case."

Thus equity is "an improvement of the statute where it commits a mistake by reason of its general expression." "This also is the reason why all things cannot be regulated by statute; for about some things it is not possible to enact a law." [17]

What the Greeks thus call ἐπιεικὲς δίκαιον is equivalent to the Roman "aequitas," the foundation of the celebrated 'interpretatio jurisprudentium," which according to Pomponius is identical with "jus non scriptum."

§ 3. *"Aequitas" and "Logical Exposition."* "By none of its brilliant specific maxims has the Roman law acquired so strong a title to immortality as by the manner in which it has defined upon principle its own relation toward equity." These significant words of Kipp [18] are at the same time an excellent characterization of the Roman method of legal exposition. For that method is based on the principle of equity, expressed in the sources (like the ἐπιεικές of Aristotle) by the term "aequitas" ("aequum et bonum, aequum, bona fides"). Equity is the necessary presupposition of correct interpretation. It demands a treatment that is appropriate to the circumstances of each case. The law is equitable when every element in the state of facts that is entitled to be considered is actually so considered.[19] The law

[17] "Nicomach. Ethics," loc. cit. chap. 14.

[18] "Geschichte der Quellen des römischen Rechts."

[19] *Windscheid*, "Lehrbuch der Pandekten," vol. 1, § 28, p. 119.

requires to be interpreted and applied according to the demands of equity. Equity, therefore, is the basal principle of legal interpretation.[20] Without "aequitas," i.e. without a knowledge of the requirements growing out of the circumstances of the case to which the law is to be applied, it is impossible to find the true intention of the law ("mens juris, constitutionis ratio, sententia legis," etc.).

It follows that it is the part of "aequitas" constantly to supplement and at the same time improve. It is quite true that any rule of law in question has something added to it by such equitable consideration of "all the surrounding circumstances," because its literal or abstractly logical sense is not capable of furnishing a specific norm for all specific cases. Something is read into the law already formulated which cannot be found in the literal text or its sense according to formal logic.[21] "Aequitas," therefore, as a principle of interpretation, excludes both a strict adhering to the letter of the statute and what is called "logical exposition." As is said by Celsus: Even one who acts "in fraudem legis" may not offend against the letter of the statute, and yet "salvis verbis legis sententiam ejus circumvenit."[22] For this reason a merely grammatical interpretation may be held a malicious perversion of the law ("Callidum versutumque jus, calumnia, nimis callida

[20] *Kipp*, loc. cit. p. 7, note 13, and in *Pauly-Wissowa's* "Realencyclopaedie." Similarly *Celsus*, Dig. 50, 7, 90: "in omnibus quidem maxime in jure aequitas spectanda est," and especially Dig. 1, 1, 1: "jus est ars boni et aequi." Regarding *H. Krüger's* paper ("Die humanitas" etc., Z. Sav. f. Rg. 19, pp. 6–57, in which "aequitas" is confused with concepts like "pietas" and "humanitas," cf. *Kipp*, "Geschichte," etc., 3. ed., § 2, note 27, pp. 9–10.

[21] Cf. C. 1, 14, 1, where Roman "interpretatio" is correctly understood as intermediary between written law and "aequitas"; "inter aequitatem jusque interposita interpretatio"; see also: *Cicero*, "De republica," v. 2: "aequitatis explanatio, in qua juris erat interpretatio."

[22] Dig. 1, 3, 29. — Comp. also *Paulus*.

interpretatio, summa injuria," etc.[23] The same thing is true, however, of logical exposition after the manner of modern scholastic jurisprudence. It is quite possible that such interpretation[24] may be incompatible with the demands of equity no less than the driest sort of literalism. For the Roman jurist was not satisfied with the result of logical exposition merely because it was logical or in accordance with the original intention of the legislator.[25] "Propter utilitatem strictam rationem insuper habemus," says Papinian smartly,[26] meaning thereby: we leave the strict rule aside when it does not help to attain the true object aimed at.

Of course, all this does not mean such arbitrary subjectivity as is advocated by the modern movement for free legal decision.[27] The juridical peculiarity of Roman "aequitas" lies rather in this, that it shows the possibility of a method which considers itself bound by the statute and yet remains capable of further developing the law.

§ 4. *History Continued: Later Roman Law.* Unfortunately, the manner in which legal hermeneutics have "developed" in later times constitutes nothing better than a degeneration of this discovery of the Roman law. For the absolutism of the later Empire caused a radical change. Imperial omnipotence reserved to itself the interpretation of the law: "Inter aequitatem

[23] Significantly especially in *Cicero*, "Brutus," 145, 198; "De orat.," i, 292; "Pro Caecilio," 57, 65, 77; "Pro Mur." 27; "De officiis," i, 10, 33, etc.

[24] Roman terms for this (see *Kipp*, loc. cit.): "stricta ratio" (Dig. 11, 7, 43); "strictum jus" (Fig. 5, 3, 50, 1; 3, 5, 30; 23, 2, 67, 1); "rigor juris" (Dig. 40, 5, 24, 10); "suptilitas juris" (Dig. 39, 5, 25); "suptilis ratio" (Dig. 8, 3, 11); or simply "jus" (Dig. 15, 1, 32 pr., 39, 3, 2, 5).

[25] Regarding the value attached to the "intention of the legislator" by Roman jurists, cf. *Kohler's* excellent compilation in Grünhut's Zeitschrift, vol. 13, pp. 1 seq., note 2. — Comp. also on this point, *Regelsberger*, "Pandekten," § 35, p. 144, note 10; *Austin*, "Jurisprudence," vol. 2, 1027; *Kipp*, loc. cit. p. 7, note 17.

[26] Dig. 11, 7, 43.

[27] C. 7, 14, 7; cf. also Const. de Conf. Dig. c. 18.

jusque interpositam interpretationem nobis solis et oportet et licet inspicere." [28]

This proposition proved exceedingly injurious for the manner in which the Glossators understood the matter. Their firm belief in the absolute authority of the Justinian compilations of the law, their lack of historical knowledge, their scholastic habit of mind, and the exegetical manner of treating their subjects [29] all kept them from independently penetrating the problem of the application of the law, just as they were kept thereby from an unbiased consideration of the leading principles of interpretation. In regard to this theoretical problem, as regarding everything else, the statements found in the Corpus Juris were treated like obligatory rules and incontestable truths. Thus in administering the law nothing was considered legitimate except a reference of the matter to some citation in the Corpus Juris ("authentic interpretation"), and nothing left to the judge but a purely declaratory interpretation. Accordingly the judicial function consisted in nothing more than the preservation and scientific exploitation of the law as it actually stood.[30] This soon gave rise to the method of supplying new rules of law out of the existing system of legal rules.

The first scientific and systematic treatment of this rule is found in Donellus.[31] His theory is properly the

[28] Tendencies in that direction may be found in Dig. 15, 1, 32, pr.; Dig. 39, 3, 2, 5; in this connection, *Windscheid*, "Pandekten," vol. 1, § 28, note 4, intimating that "the attitude of the jurist used to be much more independent than to-day." Contra, *Kipp*, loc. cit.; cf. also *Pauly-Wissowa*, loc. cit.

[29] *Brie*, "Gewohnheitsrecht," vol. 1, 96–97.

[30] Cf. *Stintzing*, "Geschichte der deutschen Rechtswissenschaft," vol. 1 (1880), pp. 102 et seq.; *Landsberg*, "Die Glosse des Accursius," p. 25: "the purely deductive and strictly logical procedure which may be called particularly 'dialectics'"; cf. also *Brie*, loc. cit.; further, *Falk*, "Die Analogie im Recht," 1906, 24 et seq.

[31] "Comentarii de jure civili," lib. 1, c. 13, § 1, seq.

foundation of that traditional and accepted "logical exposition" which was later developed especially by Savigny. In sharp contrast to the Roman idea of "aequitas" this theory sanctions the notion that there are no omissions in the positive law, that the original and unchanged intention of the legislator is to be sought, and further, that for applying the law, formal dialectic logic suffices.[32]

This method was especially followed by the Law of Nature school. In the face of their own fundamental principle,[33] even the most radical protagonists of the Law of Nature advocate the identical logical method which we find among the glossators and commentators.

The historical school of jurists likewise, as far as our present problem is concerned, did nothing more than continue the doctrine of logical and pragmatical exposition. It was but lately that the traditional doctrine was elaborated, by Savigny and his eminent followers, into a complete theoretical system. "The days of this school

[32] Among the immediate successors of Donnellus (1527–1591) may be named especially: *Forster*, "Interpres sive de interpretatione juris libri duo," lib. 2, c. 12 seq. (cited from *Otto*, "Thesaurus juris Romani," vol. 2, 1733). — In regard to the hermeneutics of the canon law, which on the whole has the same result, cf. *Reiffenstuel*, "Jus canonicum universum," vol. 1, passim; and *Schulte*, "Geschichte der Quellen und Literatur des canonischen Rechts," vol. 1 (1875), 212–220.

[33] According to the principles of this school, the law of nature, constituting the highest authority, ought to be acknowledged at least as subsidiary law. Obviously the method of interpretation appropriate to this point of view would be one in which the formulated law is supplemented from the outside, by means of the law of nature (cf. *Pfaff-Hofmann*, "Comment.," vol. 1, 194 seq.). In practice, however, this theory is never seriously applied. Even the most radical adherents of the theory, when they come to deal with interpretation in detail, present the same "dialectical method" we found above. Cf. *Pufendorf*, "De jure rationali et gentium," vol. 5, 12; also *Zeiller*, "Comment. zum öst. BGB," ad. §§6–7, who does not only defend all the fundamental principles of the traditional method but even calls the application of the famous section 7 "exceedingly problematical" (loc. cit. vol. 1, p. 66); cf. further, *Winivarter*, "Das österreichische bürgerliche Recht," vol. 1 (1831), p. 82, note 2. — See also *Glück*, "Pandekten," vol. 1, 205–301, and *Rotteck-Welcker*, "Staatslexikon," 517–518.

are numbered," says Gmür,[34] but in the textbooks of the Civil Law and of the German Civil Code, as well as generally in systematic treatises on private law, its teachings still figure as the accepted doctrine.[35] However, what we have said above shows plainly enough that this is not the Roman manner of applying the law but merely a degenerate form thereof. Such formal logic was alien to, nay, even despised by Roman jurists. It is the product of a development which gradually deviated from the fundamental idea of the Roman administration of the law.

§ 5. *The Modern Problem.* No doubt can exist, therefore, that primarily a judicial practice which corresponds more closely to the needs of actual life may be obtained by a return to the Roman principle.

It must not be a question of working toward a "more independent position" of the judge. "There is so much talk about the difference existing between the functions of the modern and the Roman lawyer as regards the evolution of the law. It is claimed that the work of the latter constituted one of the sources of the law, while this function is denied to the labors of the former. In this there is at least some exaggeration, against which a protest should be raised, because it carries with it certain practical dangers."[36] The true problem is merely that of applying better methods in the use of powers which the judge already possesses.

[34] *Gmür*, "Die Anwendung des Rechts," p. 9.

[35] Among many, cf. especially: *Windscheid*, loc. cit. §§22 et seq.; *Thöl*, "Einführung," etc.; *Regelsberger*, loc. cit. §35; *Dernburg*, "Pandekten." — On recent works in Austria, cf. *Pfaff-Krainz-Ehrenzweig*, "System des österreichischen allgemeinen Privatrechts," vol. 1 (4 ed., 1905), pp. 42 seq. — For French literature, comp. *Laurent*, "Cours élémentaire," p. 15: "On ne doit jamais séparer l'esprit de la loi de son texte . . . . le texte et l'esprit . . . . c'est une seule et même chose: la volonté du législateur."

[36] *Regelsberger*, "Streifzüge," p. 16.

Like the Roman jurists, so should we also formulate and explain scientifically the method which makes possible the kind of judicial law described above, which must necessarily arise in the course of administering justice. We ought not "to represent as something theoretically impossible that which practically arises in a continuous current and is found quite indispensable." [37]

§ 6. *The Problem of Unprovided Cases.* This manner of putting the question takes us back unavoidably to the concept of ἐπιείκεια or "aequitas." "The equitable is an improvement of the law where that commits a mistake on account of its general form of expression"; for "all things cannot be regulated by law because, regarding some things, it is impossible to enact laws."[38]

In other words: the problem of how to apply the law cannot be solved scientifically except by considering the problem of unprovided cases.

One may well find the beginning of a scientific appreciation of this matter in the celebrated work of Gény, "Méthode d'interpretation et des sources en droit privé positif." [39] The merit of this work consists in this, that the author for the first time strongly emphasized and systematically utilized the scientific possibility of unprovided cases.

He failed, however, to expound in detail the leading thoughts of his theory or to emphasize them with conscious appreciation of their consequences. Drawing too sharp a dividing line between "passive interpretation" and "supplying of omissions," he tries to explain the

[37] *Aristotle;* see notes 16 and 17 supra.

[38] *Kipp*, note in *Windscheid's* "Pandekten," vol. 1 § 28, § 121.

[39] *Rumpf* (loc. cit. note 3), p. 21, correctly suggests that the success of this eminent and broadly conceived work was at the same time, in no small part, a success of German jurisprudence. Not to mention older standard works, comp. especially *Ehrlich*, "Lücken im Recht," in: Burian's Juristische Blätter, vol. 17, 417 seq.

former function exclusively in the narrow manner of the accepted doctrine. For the second function, however, he allows an exceedingly "free" "libre recherche scientifique."[40] That means, he forgets that the demarcation drawn by him cannot be carried out in practice. After all, a rule is never plain and circumstantial but when it fits in every respect the case to be decided; in all other instances it is necessarily doubtful and full of omissions. The error of Gény consists in this, that in connection with unprovided cases he thinks only of technical errors in the draftsmanship of a statute, obvious mistakes of the legislator, or important changes in economic and social conditions. He fails to consider at the same time the circumstance that the specific facts in individual cases produce "gaps" in every legislative provision. In this respect he has not succeeded in appreciating sufficiently the true relation of the statutes to the whole body of the law. He has not understood, or at least not scientifically set forth, the Graeco-Roman point of view described above, according to which it would be an impossible task for the legislator to express every general principle of law with such clearness that out of this rule the application to all individual cases might be evolved by a simple chain of deductions.[41] There has always been need of emphasizing more strongly the point already made by Aristotle, that it is not the purpose of a statute to establish a specific rule for every relation of life that may occur.[42]

[40] *Gény*, loc. cit. 457 seq., 580 seq. For a critical appreciation, see *Perceron*, in: Annales de droit commercial et industriel français, vol. 14, 145–160; *Eycken*, "Méthode positive," pp. 368–386; *Lambert*, (loc. cit. note 8) pp. 34 seq., and authorities cited p. 29, note 1; see also *Rumpf*, loc. cit. pp. 25–28.

[41] Comp. *Danz*, "Auslegung der Rechtsgeschäfte," 2d ed., 1906, p. 79.

[42] Valuable suggestions on this point especially in: *Kohler*, in Grünhut's Zeitschrift, vol. 13 seq., Jhering's Jahrbücher, vol. 25, pp. 270 seq., and "Lehrbuch des bürgerlichen Rechts," vol. 1, pp. 122

§ 7. *Free Legal Decision.* Next came the school of "free judicial decision," which in appearance took to heart what has been said here and attempted to elucidate scientifically the "mysterious saying," "La loi n'est pas le droit." Its adherents start from the proposition that a statute does not contain a comprehensive rule for the decision of cases. According to this school there are nothing but "specific decisions." The application of a statute should be limited, therefore, "to those cases which the statute itself decides." The statute is to be resorted to first, but only in those cases which it mentions specifically. In all others there is to be a "truly free" manner of decision.[43]

Such a notion as this, however, does not get us much further than the existing doctrine. In the first place, Fuchs goes too far when he conceives all statutory provisions as "specific decisions." The statute never decides a specific case but establishes general rules.[44]

Precisely for this reason it is not possible to draw a sharp distinction between statutes that provide for all cases and those that contain "gaps." The line is

seq. Also: *Bülow*, "Gesetz und Richteramt," pp. 41 seq.: *Hartmann*, in: Archiv. Ziv. P., vol. 73, pp. 309 seq., 400 seq.; *Zitelmann*, "Die Rechtsgeschäfte," pp. 1 seq., "Kunst der Gesetzgebung," Dresden, 1904, pp. 40 seq.

[43] Expressed in the most radical and exaggerated manner by *Fuchs*, "Recht und Freiheit in unserer heutigen Justiz" (Berlin, 1908), pp. 14, seq., and again: "Die Gemeinschädlichkeit der konstruktiven Jurisprudenz" (Karlsruhe 1909), especially pp. 75 seq.; comp. also *Gmelin*, "Quousque!" (Hannover 1910); *Sinzheimer*, "Die soziologische Methode" (Munich, 1909). Contra: *Düringer*, "Richter und Rechtsprechung" (1909, and also in the paper "Eine neue Methode," etc., in Das Recht, 1909. — Cf. also *Cruet* loc. cit. (note 1).

[44] In principle this is true even of statutes drawn so as to cover specifically the various cases, and still more so our modern statutes. In these it seems entirely proper "to adhere to the principle of progressing beyond specific provisions toward general rules." (*Huber*, "Erläuterungen zum schweizerischen Zivilgesetzbuch," 1902, p. 24.) Comp. also: *Gmür*, loc. cit. pp. 27–28; *Bülow*, loc. cit. pp. 30 seq.; *Gény*, "La Technique législative," in "Livre du Centenaire du Code Civil," vol. 2, pp. 989 seq.

altogether vague. A statute is never likely to contain an absolutely exact and direct decision of a case as it arises, for there will always be some features with which the abstract rule of law cannot concern itself. For these a supplementary rule of specific application, established by the judge, seems to be absolutely necessary. The distinction made by Fuchs, according to which the statute is to be limited to the decision of cases for which it specifically provides, is therefore erroneous in theory and cannot be carried out in practice. We should rather say that the general framework furnished by the statute is to be filled in, for each case, by means of interpretation, that is, by following out the principles of the statute.[45] In every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretative function. It is, in fact, the urgent task of legal science to establish in an exact and practical manner the fundamental principles of the proper method by which the courts may supply such omissions.

§ 8. *The True Method.* The most important contributions toward this object were first offered by von Bülow.[46] The significance of his position must be sought not only in the fact that he first attacked the dogma, uncontroverted theretofore, according to which the courts had nothing to do with lawmaking, but especially in his scientific exposition of judicial law, which he declares to be a command of the State establishing rules of law.[47] In this manner he has tried to investigate and expound the significance of judicial law as supplementary to statutory law.

[45] Comp. the very apt remarks of *Neukamp*, in "Juristisches Literaturblatt," vol. 20, p. 146.

[46] "Gesetz und Richteramt," pp. 35 seq., 45 seq.

[47] Comp. also his "Geständnisrecht" (1899), pp. 130 seq.; and "Heitere und ernste Betrachtungen über die Rechtswissenschaft" (1901), passim.

Official legal science, however, has quietly passed by this exceedingly valuable essay. It was but quite recently that his ideas found appreciation and were further developed,[48] but such appreciation means an acknowledgment, scientifically and officially, that there is such a thing as courts making law, and that the supplying of gaps by adjudication is one of the sources of law.[49]

A detailed discussion of these propositions would exceed the limits of space at present at my disposal. Consequently I leave to some other occasion their utilization for an elaborate theory of legal sources. Yet I may be permitted to sketch the outlines of the correct method of studying the manner of applying the law.

§ 9. *Reasons for Gaps in the Statutes.* The fact that statutes commonly fail to provide for some cases that will arise may be analyzed as follows:

a. There are gaps in a narrow or technical sense when there is a lack of detailed, abstract rules by which a submitted case may be decided.

b. The framework given by the text of the statute may not be filled in when the text does express all that can be said in general terms[50] yet does not furnish rules for individual cases directly but refers, explicitly or by implication, to some other source of law.

[48] *Bülow*, loc. cit., in: "Das Recht," vol. 10, pp. 770 seq.

[49] Cf. especially *Gmür*, "Die Anwendung des Rechts," pp. 71–80; *Danz*, "Die Auslegung der Rechtsgeschäfte," (2d edition, 1906), and "Jhering's Jahrbücher," vol. 50, pp. 1 seq.; *Wendt*, "Die exceptio doli generalis," etc., in Archiv. Ziv. P. vol. 100, pp. 1 seq., and especially p. 101; *Stier-Somlo*, "Das freie Ermessen, in: "Festgabe für Laband," 1908, pp. 447 seq.; *Oertmann*, "Gesetzeszwang," etc., loc. cit. (note 1). While Gmür deals principally with the need of individualizing and making more concrete the abstract rules of law, the other authors mentioned treat especially of the changeability of certain imported juridical concepts, such as good faith, business customs, circumstances of the case, and show how they should be interpreted, according to the principle of "aequitas," so as to fit the varying needs of business life.

[50] Comp. *Zitelmann's* fundamental observations, which are at the basis of the whole theory of "gaps in the law," in his well-known treatise "Lücken im Recht" (1903), pp. 30 seq.

Under this head, the following subdivisions may be distinguished:

a. Express reference to some other source of law, and under this:

aa. Reference to the discretion of the court.[51]

bb. Reference to an unwritten yet objectively ascertainable rule (e.g., good faith, considering the custom of the trade).[52]

b. Tacit reference by means of what has been called [53] the statutory concepts of value.[54] In such cases also judicial interpretation makes law on the basis of "aequitas." For statutory provisions, as Kipp very properly emphasizes in regard to Roman "aequitas," are for the most part "drawn in such a manner that one cannot conceive at all of their application without the intervention of equitable discretion, for the reason that they operate constantly with concepts taken from life without

[51] Cf. *Zitelmann*, "Lücken", pp. 29 seq. — *Oertmann*, loc. cit. pp. 19 seq. Legal consequences are provided generally by the statute, but the measure is fixed in each individual case by the court. An illustration is the fixing of a criminal sentence within the limits given by the statute, where there can be no review of the judicial discretion of the court.

[52] Typical illustrations are found in sections 157, 242, BGB; comp. the detailed discussions by *Danz*, loc. cit.; *Wendt*, loc. cit.; and *Oertmann*, loc. cit.

[53] For elucidation of these concepts, see *Zitelmann*, "Kunst der Gesetzgebung" (Dresden, 1904) p. 40; *Stier-Somlo*, loc. cit. p. 471, seq.; *Oertmann*, loc. cit., especially p. 13 seq., and note 8, p. 46.

[54] In such cases it appears as if the statute had expressed everything exhaustively and in detail, yet it turns out that the terms and concepts used need to be furnished with concrete contents. The terms themselves are nothing but more or less insufficiently filled outlines. There is nothing better than a rudimentary rule, yet one capable of being objectively ascertained, because the statute refers implicitly to matters (like business usages and similar things) which in practical life are generally understood. Such subsumptions are properly subject to revision on appeal. (*Oertmann*, loc. cit.; *Zitelmann*, loc. cit.) This subject has been touched upon by authors, but its true importance has hardly been appreciated. Comp. especially *Ehrlich*, loc. cit. in Burian's Juristische Blätter, vol. 17, p. 447; same author, "Die stillschweigende Willenserklärung," p. 293; "Freie Rechtsfindung," pp. iii–vi; "Tatsachen," pp. 26 seq.; *Zitelmann*, "Lücken," pp. 45–46; p. 32, note 18. Comp. also *Laband*, "Staatsrecht," vol. 1, § 57, iiii.

themselves analyzing them." [55] Properly they express their intention by indirection only.[56] In such cases the Court is bound, to be sure, by the statute, but finds in it only the raw material of actual rules, and it is his business out of this to fashion the actual rules. In this connection Danz says aptly that usages of business recognized in accordance with the Code[57] are "rules of customary law sanctioned by the statute" itself.[58] Of themselves such rules are not law — they become such by the action of the Court in recognizing them pursuant to the express or implied reference to them found in the statute.

In either case, both where there are technical gaps and where the framework of the statute is empty, there must be, for the decision of concrete cases, the supplementary function of the judges based on the principles of justice ("aequitas").

It will be the mission of a future theory of the sources of law to supply the proper appreciation, corresponding to its importance, of the judicial law so arising as an integral portion of the body of law in force, and as a most valuable element of the law actually administered.

[55] *Kipp*, "Geschichte der Quellen," p. 11.

[56] In such cases the statute refers, expressly or by implication, to some other source whence the rule may be drawn. (Comp. *Gustav Schwarz* in the Hungarian magazine "Jogallam," vol. 6, p. 99.) In the great majority of cases, this "other source" consists of the kind of social phenomena we call "popular customs." These are simply institutions of social life produced spontaneously and changing from time to time without the interference of official legislation. (*Laband*, loc. cit. p. 553.) The vague provisions of a statute mentioned in the text (in the present sense, all legal concepts are vague) are capable of being filled with concrete contents by reading them in the light of such social phenomena. We have in mind not merely what has been called "safety-valve concepts," which modern draftsmen of statutes use to make the statute more elastic; we rather refer to any statutory term, the concrete meaning of which depends on the changing circumstances of practical life. ("The nature of the case," so called; comp. *Ehrlich*, in Harden's "Zukunft," vol. 14, p. 234.)

[57] BGB § 242.

[58] *Danz*, "Die Auslegung der Rechtsgeschäfte," p. 101.

A theory of legal sources that pays attention to the law as it really is cannot possibly disregard the existence of judge-made law. Such law does actually exist, and theoretical inquiry simply has to recognize and utilize it. This will be done if we divide all rules of law into statutory rules of general obligation on the one hand, and judicial or supplementary rules obligatory in the specific case. The former represent "law" in its strict sense, the latter equity as understood by the Greek ἐπιεικές or the Roman "aequum."

CHAPTER V

THE PERILS OF EMOTIONALISM

SENTIMENTAL ADMINISTRATION OF JUSTICE: ITS RELATION TO JUDICIAL FREEDOM OF DECISION

BY FRITZ BEROLZHEIMER[1]

§ 1. "FREEDOM OF JUDICIAL DECISION" IN SUBSTANCE NOT A NEW IDEA. — § 2. "JUSTICE BASED ON THE ADJUSTMENT OF INTERESTS" AN UNTENABLE STANDARD. — § 3. "FREE APPLICATION OF LAW" EQUIVALENT TO DECISION AGAINST THE ESTABLISHED RULE.—§ 4. "FREEDOM OF JUDICIAL DECISION" TO BE APPLIED ONLY IN ACCORDANCE WITH LEGAL PRINCIPLES. — § 5. THE PRINCIPLES OF "FREEDOM OF JUDICIAL DECISION" GROW OUT OF HISTORICAL AND ECONOMIC CONDITIONS.—§ 6. THE BASIS OF "FREEDOM OF DECISION" IS THE IDEA OF LIBERTY, i.e., THE ELIMINATION FROM THE LAW OF ALL OPPRESSIVE ACTION.

§ 1. *"Freedom of Judicial Decision" in Substance not a New Idea.* Regarding the propositions commonly comprehended under the term "freedom of judicial decision"[2] there seems to-day to be a consensus of

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[2] *Gény*, "Méthode d'interprétation et des sources en droit privé positif," Paris, 1899 ("libre recherche scientifique"), pp. 457 seq., 580 seq. Further, *Ehrlich*, "Lücken im Recht," In Burian's Juristische Blätter, vol. 17, pp. 417 seq.; *Ehrlich*, "Freie Rechtsfindung und freie Rechtswissenschaft," Leipzig 1903; *Wurzel*, "Das juristische Denken,"

opinion to this extent, that the great majority of lawyers wish to see the courts emancipated from the letter of the law,—at least in cases where the application of the established rule would imply unjust harshness, or even where it merely appears inequitable. Ulpian's maxim: " . . . durum est, sed ita lex scripta est" is to be converted into its opposite.

It would seem, therefore, that there is substantial unanimity about the desirability of "freedom of decision," except for a few extremists and some all too strict believers in the letter of the law. But we are far from finding a clear understanding of the theoretical nature of such freedom, looked at (if I may use the term), from the standpoint of legal philosophy; and there is still less comprehension of the legal inferences and actual consequences that will follow from the new spirit; or of the dangers which the vagaries of court decisions may introduce, especially in Germany. Finally, least of all, is there any certainty as to the principles according to which the courts are to decide after they have been freed from the fetters imposed by the "intention of the legislator."

The expression "freedom of judicial decision" is indeed of recent date; but the thing intended to be expressed thereby is, in substance, nothing novel. The courts have never shown themselves to be mere

Vienna 1904; *Cruet*, "La Vie du droit et l'impuissance des lois," Paris 1908; *Fuchs*, "Die Gemeinschädlichkeit der konstruktiven Jurisprudenz," Karlsruhe, 1909.

As far back as 1886, *Kohler* argues strongly against the view that every decision must be based upon an express statute (Grünhut's Zeitschrift, vol. 13, pp. 1–61, p. 49).

Compare also, quite recently, *Rolin*, "Prolégomènes à la science du droit," Brussels and Paris, 1911. (Rolin advocates sociological jurisprudence. It is not the "intention of the legislator" that changes the law but rather "tout le droit est coutumier." Penal laws, if too harsh, may remain ineffectual because the courts will not apply them. Loc. cit. pp. 116–118.) Similarly *Cruet*, loc. cit. p. 252 ("La mort naturelle des lois; la désuétude").

worshipers of the letter,—barring certain periods of imperfectly developed judicial activity. The degree of freedom exercised has differed widely, according to the character of the legal rules actually in existence and the prevailing opinion regarding the duty of judges. In periods when legislation was sluggish, in jurisdictions where the formulated law [3] was very fragmentary, and whenever the judges entertained exalted notions of their office, the constant practice of the courts has treated existing rules with a vigorous freedom which to-day seems hardly credible. One need but remember the "aequitas" of the Romans; further, the reception of the Roman law in Germany; the refusal to apply the Draconian provisions of the "Carolina" [4] on the ground that the practice of the courts had made them obsolete; the decision of doubtful questions in international law up to recent times; the free judicial interpretation of the French practice and of the Anglo-American judiciary; the decisions based on analogies in our own courts; and the verdicts of our lay judges that are so often based on a mere sense of justice.

While thus we see that everywhere the position of the judge is relatively unfettered, it may on the other hand be easily believed that little encouragement to a free movement of judicial method would be expected of a code going into detail to the extent employed in the "Preussische Landrecht" or of a doctrine directing the court, in doubtful cases, to follow "the intention of the legislator."

[3] [TRANSLATOR'S NOTE: "Gesetzesrecht," which comprises all law actually promulgated, whether as statute or other written law, or court decisions, or generally accepted opinions of writers. It excludes those rules which, according to the theory of Anglo-Saxon judicial interpretation are indeed implied in the existing body of legal rules but have not yet been formulated.]

[4] [TRANSLATOR'S NOTE: The criminal code adopted for the Empire under Charles V.]

Thus, in former times and other countries, "freedom of judicial decision" was exercised when there was need for it, on the basis of legal tact, without saying much about it and without worrying how such practice "praeter legem" and even "contrâ legem" might be theoretically justified (either in the law of procedure or in constitutional law). At the present time, however, the claims of "freedom of judicial decision" are put forward vociferously and insistently as new demands. One might be inclined to explain this change by saying that the present epoch possesses a greater receptivity for matters of legal philosophy and methodology. Yet this cannot be the principal reason; for in prior epochs, which felt greater interest in legal philosophy, this problem was avoided or disposed of in a few words.

§ 2. *"Justice Based on the Adjustment of Interests" an Untenable Theory.* In the days of the Law of Nature theory, when people believed in a natural law over and above positive law, the judge decided according to this Law of Nature whenever he modified a positive rule. Consequently his decision "praeter" or "contrâ legem" could not give rise to any particular problem. This is still the case in decisions according to the unwritten law, in Anglo-American jurisprudence.

When faith in this higher law as given by Nature began to wane, the "intention of the legislator" became a welcome substitute. A distinction was drawn between statutory and customary law[5]; in default of a basis of custom the decision had to be fitted into some statute as best it might. To that end the judge reverted to what the legislator was supposed to have intended, or what at least he might have intended. This presumptive

[5] Development of law by "convention" is but a sub-species of statutory law. Comp. my "System der Rechts- und Wirtschaftsphilosophie," vol. 3 ("Philosophie des Staates"), Munich, 1906, pp. 325–331.

intention became the actual intention of the legislator. Modern judicial interpretation, however, is not satisfied to do this. The intention of the legislator proves to be a fiction, and the judges, anxious for something to lean on, cast about for a new support. One theory maintains that such support is offered by a "justice based on the adjustment of interests." [6]

This theory of "adjustment of interests" demands that the judge proceed in analogy to the legislator by a careful weighing of all the interests affected. However, even if we were to overlook entirely that the interests to be weighed would be mostly of an imponderable character, especially in the various fields of public law (criminal, political, administrative, international, and ecclesiastical law) — is it at all correct, historically, that law

[6] Compare *Stampe*, "Rechtsfindung durch Konstruktion," Deutsche Juristenzeitung, vol. 10, 1905; pp. 417–422; "Rechtsfindung durch Interessenwägung," in Deut. Juristenztg., vol. 10, pp. 713–719 ("interests found worthy of protection" are to be decisive, loc. cit. 417, 717); "Gesetz und Richtermacht," in Deut. Juristenztg., vol. 10, pp. 1017–1022. *Mueller-Erzbach*, "Die Grundsätze der mittelbaren Stellvertretung aus der Interessenlage entwickelt," Berlin, 1905 ("Real method of law formation"). *Rumpf*, "Gesetz und Richter," Berlin, 1906, pp. 81–87 ("Finding values," and "Weighing of values").

Compare further: *Heck*, "Die Fortbildung des bürgerlichen Rechts im Wege der Rechtsverordnung," in 46. Jahresbericht der Juristischen Gesellschaft zu Berlin, 1906, pp. 72–84. (Contra *Stampe*, loc. cit. p. 79.) *Heck*, "Interessenjurisprudenz und Gesetzestreue," Deut. Juristenztg., vol. 10, pp. 1140–1142. "Was ist diejenige Begriffsjurisprudenz, die wir bekämpfen?" in Deut. Juristenztg. 14, pp. 1457–1461. (Page 1460: The main task of administration of the law is to inquire into the connection between legal rules and the condition of interests, in other words: the investigation of interests.)

CONTRA: *Landsberg*, "Das entgegengesetzte Extrem?" in Deut. Juristenztg, vol. 10, pp. 921–925. *Vierhaus*, "Die Freirechtsschule und die heutige Rechtspflege," Deut. Juristenztg., 14, 1909, pp. 1169–1175. Comp. also *M. Rümelin*, Address: "Bernhard Windscheid und sein Einfluss auf Privatrecht und Privatrechtswissenschaft," Tübingen 1907, p. 24.

According to *Regelsberger*, "Gesetz und Rechtsanwendung," Jhering's Jahrbücher, 58, 1910, pp. 146–174, "the judge is indeed bound by the existing rule," but Regelsberger distinguishes, primarily in private law, between inflexible rules of law, incapable of development by jurists, for instance §§ 90, 253, 246, 656, 762–764, 1297 BGB; and legal rules capable of development (loc. cit. pp. 155 seq.).

is the outgrowth of a balancing of the interests and needs of the various sections of a commonwealth? On the contrary, has not rather each substantial and fundamental change in the law been the result of a struggle and the victory of one part of the community over the other — a struggle, to be sure, under the banner of a more modern and advanced idea of justice, and a victory of law purified over a stagnating condition that had come to be felt as unjust?

The great gains for freedom during the centuries since the end of the middle ages were only obtained by the assumption of new powers on the part of those formerly subject to power, and not uncommonly by threats of force, or actual use of force. Such was the process which led to the liberation of secular concerns from ecclesiastical oppression; the political emancipation of the middle classes; the raising of the peasantry from serfdom; the giving of political equality to the Jews; the economic freeing of the propertyless workingmen; and finally, quite recently, the social and professional emancipation of women.[7] And similarly, it is changes in cultural or social points of view, and in substantial relations of power or economic conditions, that have opened the way for newly arisen or transformed legal notions, — when for instance criminal law and procedure, from the Caroline to modern days, were changed radically and now again seem to need reform; or when in the future intercourse of nations the idea of arbitration takes the place (as it ought) of diplomatic intrigues; or when through the increase of economic relations beyond the national boundaries it becomes desirable to unify commercial laws or patent and copyright laws.

[7] Comp. my "System der Rechts- und Wirtschaftsphilosophie," vol. 2 ("Die Kulturstufen der Rechts- und Wirtschaftsphilosophie"), Munich, 1905; vol. 3 ("Philosophie des Staates"), Munich, 1906.

In all such cases the legislator has nothing to do with the "weighing of needs or interests," and could do nothing with it. And the courts quite as little. Just as well, or just as ill, as on the basis of the "justice based on needs or interest" might cases be decided by the throw of dice. The "justice based on needs or interests," which in the last analysis may be reduced to Jhering's utilitarian theory,[8] offers an erroneous standard for the weighing of the unweighable. Moreover, it puts profit and advantage in the place of right and justice, so that the function of doing justice would be degraded to a mere act of administration. Thus it signifies in reality the exact opposite of what it believes and claims to be.

§ 3. *"Free Application of Law" Equivalent to Decision Against the Established Rule.* When is this "free application" by the court to take place? The generally accepted opinion to-day inclines toward saying: The court may and should expound the law freely "praeter legem," but to allow a free application of law "contra legem" would amount to a straining of judicial power. As against that, one should inquire whether in reality an exposition according to the principles of "freedom of decision" can ever be merely "praeter legem," or whether it does not always take place against the formulated rule. Does the decision of the freely expounding judge simply supply a rule where none existed before, or are there no cases at all that are not covered by an existing rule?

The most searching inquiries into this subject are undoubtedly those of Bergbohm[9] and Zitelmann.[10]

Bergbohm, in his radical opposition to the doctrine of the Law of Nature, tries to prove the unbroken unity of the law by invoking the "power of logical expansion"

[8] *Jhering*, "Der Zweck im Recht," 4. edition, Leipzig, 1905.

[9] "Jurisprudenz und Rechtsphilosophie," I, Leipzig, 1892, pp. 371–393.

[10] "Lücken im Recht," Bonner Rektoratsrede vom Oktober, 1902 Leipzig, 1903.

of the established law.[11] Bergbohm's exposition itself has a logical unity of its own; but it starts from the assumption that all external relations not governed by established rules would drop into a "legal vacuum," no matter "how strongly they may call for legal regulation."[12] But though German law, for instance, failed for a long time to adopt a specific rule for railway-accidents liability, and though to this day it has failed to enact specific laws regarding cartels and trusts, yet these matters did not "drop into a legal vacuum." On the contrary there *is* a rule for these matters, but a rule obnoxious to the sense of justice of our times.

Here is where Zitelmann's view offers us sound premises. He shows that (usually) the so-called "unprovided case" in law is not really unprovided for in the sense that there is no legal standard for the decision of such a case. "Rather, the truth is simply this, that in cases like that under discussion an exception is invariably made to some existing general rule. The status of such cases is that an exception from the general rule ought to have been made and this exception is based on that which one considers the purpose of the general rule. . . . Thus we see why there is talk of unprovided cases: The lack of provision consists in no exception having been declared for cases of this special character."[13] The court evidently in such cases decides not "praeter legem" but "contra legem."[14]

[11] "Jurisprudenz und Rechtsphilosophie," p. 387.

Contra: *Jung*, "Von der logischen Geschlossenheit des Rechts," Berlin, 1900, pp. 131–157; *Stammler*, "Die Lehre von dem richtigen Rechte," Berlin, 1902, pp. 271–275; *Rümelin*, "Das schweizerische Zivilgesetzbuch und seine Bedeutung für uns," Tübingen, 1908, pp. 29 seq.

[12] "Jurisprudenz und Rechtsphilosophie," p. 387.

[13] "Lücken im Recht," p. 23.

[14] *Zitelmann*, loc. cit. pp. 24 seq. "The supplying of rules for unprovided cases means that the court breaks through the general rule for this special state of facts, and finds a new rule, usually a further development of other special rules already in existence."

Of course this explanation does not apply when a statute expressly directs the court to decide according to good conscience, or according to the custom of business or trade. Here the law refers the judge to custom or equity as the material from which to frame his decision; but the source of the judgment is still the formal statute.[15]

In the genuine case of adjudication based on the principle of freedom of decision, the judge derives his judgment from a source of which it is admitted:

1. That it is not statutory law.
2. That it is not customary law.
3. That it is superior to the formulated law.

Thus the question, What is the source of this "liberty of judicial decision"? gives rise necessarily to the further question: What is the legal status of the judicial function, according to this theory of "liberty of judicial decision"? To that question we now turn.

§ 4. *"Liberty of Judicial Decision" May Be Exercised Only in Accordance with Legal Principles.* It is frequently argued that a judge deciding according to "liberty of judicial decision" is changing the established law, and consequently exercises a quasi-legislative function.[16]

[15] Consequently it may easily lead to misconceptions if in cases of this kind one speaks of "judge-made law" or "judicial rules." Thus *Danz*, "Rückständigkeit der Rechtswissenschaft, Richterrecht und Gesetzesrecht: Neue Rechtsprechung," in Deutsche Juristenztg. 1911, no. 8, pp. 565–570.

The fact that Danz himself — and correctly — does not consider the court as a maker of law, with quasi-legislative functions, appears from his observation (loc. cit. p. 566, note 2a): "These are customary rules sanctioned by the statute (BGB)."

Compare also: *"Danz*, "Die Auslegung der Rechtsgeschäfte," 3d edition, Jena, 1911.

[16] Thus, with particular acuteness: *Schlossmann*, "Der Irrtum über wesentliche Eigenschaften der Person und der Sache nach dem bürgerlichen Gesetzbuch," Jena, 1903, pp. 34–43, 36–39. — *Sternberg* "Allgemeine Rechtslehre," 1, Leipzig, 1904, p. 138, seq. (No substantially definable boundary between legislation and interpretation.) *Saleilles*, "Einführung in das Studium des deutschen bürgerlichen

That, however, is quite a mistake.[17] In such cases, no less than in others, the court is aiming merely to *render justice* between contending parties, and by no means to enact a new administrative regulation. The purpose is to decide on the basis of some source of law supposedly already in existence, — irrespective of where it is to be found or how applied.

But, conceding this, is it then correct to maintain, as Zitelmann does, that there is a general maxim to this effect: "The law is whatever is found in this statute, *but* with certain qualifications (extensions and restrictions) to be found by analogy, etc."?[18]

This attempt at solving the problem will not hold water.[19] For every statute purports to be in full and complete force, and if its effect is held to be in any way qualified, either this qualification must be expressed in the statute itself, or *there must be a source of law superior to the statute.* There must exist, then, a higher order of justice, no matter how scant in its data of materials, from which the court may derive both its authority to

Rechts" (in: *Leonhard's* "Studien zur Erläuterung des bürgerlichen Rechts," Heft 14), Breslau, 1905, p. 91.

Compare also: *Saleilles*, "De la personnalité juridique"; Paris, 1910, p. 27: ". . . The directions for the creation of a foundation should be interpreted as the creator of it would interpret them if he were there, in order to accomplish the end he had in view."

Compare, further, the excellent expositions of *Kohler*, "Ueber die Interpretation von Gesetzen," Grünhut's Zeitschrift, vol. 13, 1886, pp. 1–61.

[17] Correctly expressed by *Zitelmann*, "Lücken im Recht," p. 26. Excellently by *Jung*, "Von der logischen Geschlossenheit des Rechts," Berlin, 1900, pp. 146–148. Compare regarding this question, also *Saleilles*, "Einführung in das Studium des deutschen bürgerlichen Rechts," p. 95.

[18] *Zitelmann*, "Lücken im Recht," p. 26, with a reference to a provision of this sort in the first draft of the BGB.

[19] Nor is a solution offered by saying cleverly: "The code is an instrument of development, not of ossification." (*Saleilles*, "Einführung in das Studium des deutschen Rechts," p. 100.) For the code is the fixed result of a course of development, and as such it is indeed an obstacle to further development.

decide according to the principles of "liberty of decision," and also those principles themselves. The judge *must* have some such foundation if he is to administer justice,—if his decision is to be justified, both in his own conscience and in the eyes of the world, as a decision according to law. In no other way could the community escape that uncertainty of law which is properly regarded as an objection to the demand for "liberty of judicial decision." [20] Hence the only conceivable alternative is that there are principles of law outside of the formulated rules of law.

But is not this (one may ask) a return to the Law of Nature? By no means. Our relation nowadays to the Law of Nature is somewhat analogous to that between the alchemist and the most modern doctrines of chemistry, according to which the transmutation of particular elements into others appears possible. Like the modern chemists, we once more adopt, from a higher standpoint, in the light of recent discoveries, the available portions of earlier doctrines which during the intermediate period had been rejected altogether. The fundamental error

[20] Thus *Heck*, "Die Fortbildung des bürgerlichen Rechts im Wege der Rechtsverordnung." In "46. Jahresbericht der Juristischen Gesellschaft zu Berlin," 1906, p. 78; *Landsberg*, "Das entgegengesetzte System," DJZ vol. 10, pp. 921–925. (On page 925: "Law has for its purpose certainty and stability.") Compare further *Laband*, "Rechtspflege und volkstümliches Rechtsbewusstsein," DJZ vol. 10, pp. 10–15.

See also, very recently, *Del Vecchio*, "Sulla positività come carattere del diritto" (Prolusione al corso di Filosofia del diritto, letta l' 11. febbraio, 1911, nella R. Università di Bologna), p. 17: "The pretended freedom in the application of the law would in effect, besides being a theoretical inconsistency, constitute a permanent menace to the legal liberty of the citizens, which finds one of its principal conditions in the certainty and especially in the unshaken supremacy of the law."

On this point and on the further one that even the "extreme adherents of freedom of decision," like *Ehrlich* (*Rumpf*), *Stampe*, *Gnaeus Flavius* (*Kantorowicz*) and *Fuchs*, desire merely to find rules for unprovided cases, in other words, hold freedom of decision proper merely "praeter," not "contra legem," see: *Kantorowicz*, "Die Contra-legem-Fabel." In: Deutsche Richterzeitung, 3, no. 8, of April 15, 1911, pp. 258–263.

of the Law of Nature consisted in this, that it believed in an eternal model of law, rigidly unchangeable and superior to established rules; and that at the same time it developed this model law in accordance with the ideas of atomistic liberalism, i.e. the ideas that the State is made up of the sum of the individual citizens, that formal liberties, like freedom of contract, of engaging in business or free trade, are simply "natural rights," and similar notions. To-day we have learned, in contrast to the Law of Nature doctrine, that law is changeable by nature; that it is subject to development; that it is relative. In the civilized State of the present day, certain fundamental legal convictions are held absolutely, — for instance, the inadmissibility of personal enslavement, freedom of religious and political convictions, inadmissibility of exploitation by means of labor contracts (economic enslavement), and so forth. All these things are legal maxims which every Court puts at the basis of his decisions, without requiring a section of some code as authority. These legal maxims override even the statutory law. These are legal principles[21] even though they have not existed from the beginning and may perhaps not continue permanently. But, accepting them merely as doctrines of our own stage of civilization, we are nevertheless here dealing with law,

[21] To discover these principles is the task of the science of law, but in doing so the science of law is not a source of law as is erroneously stated by *Gnaeus Flavius* ("Der Kampf um die Rechtswissenschaft," Heidelberg 1906, p. 20). It merely utilizes the source of law in discovering and formulating such principles of law.

Kiss, who believes that the court has authority merely to find new rules "praeter legem" for unprovided cases, holds the most urgent task of a future theory of the sources of law to be the expression of the judge-made law so arising, as a part of the system of law in force, and as a most important element in the law actually administered. (*Kiss*, "Billigkeit und Recht, mit besonderer Berücksichtigung der Freirechtsbewegung," in Archiv für Rechts- und Wirtschaftsphilosophie, vol. 3, pp. 536–550; *Kiss*, "Gesetzesauslegung und ungeschriebenes Recht," in Jhering's Jahrbüchern, vol. 58, 1911, pp. 413–492, 473.

not with something outside of law. The *νόμῳ ἢ θέσει δίκαιον* is supplemented and corrected by the *φύσει δίκαιον*. The "natural" sense of justice varies according to the conditions of the time, the locality and the national character.[22] At bottom, therefore, it is not an invocation of a Law of Nature, which is absolute, but of a Law of Civilization, which is relative.[23]

Accordingly, the judge who applies the principles of "liberty of judicial decision" decides (to be sure) against the statute but in accordance with the unwritten law. The source of his law is found in what is considered to be just at any particular period and within any particular circle of civilization.

§ 5. *The Principles of "Liberty of Judicial Decision" Grow out of Historical and Economic Conditions.* These fundamental ideas of justice, these legal principles, which the judge applies when he decides according to the method of "liberty of judicial decision," — how may they be ascertained?

In the sciences dealing with the things of the mind, the historical method alone can lead us in the ways of

[22] This is in effect an approximation to the view of Stammler ("Die Lehre von dem richtigen Rechte"), who practically, although approaching from a different direction, assumes a "Law of Nature with variable content."

[23] The correct comprehension of the subject is implied by describing "freedom of decision" as adjudication according to equity. This assumes that equity (aequitas) is understood as a part of legal justice, and a decision according to equity as a legal judgment. Compare *Brie*, "Billigkeit und Recht, mit besonderer Berücksichtigung der Freirechtsbewegung," in Archiv für Rechts- und Wirtschaftsphilosophie, vol. 3, 1910, pp. 526–534, 534. In this connection, Brie holds the court authorized to supply rules for unprovided cases only. — *Reichel*, "Ergänzungen zum Referat Brie," ibidem, pp. 534 et seq., 535. To be sure, Reichel here also advocates "teleological decisions."

On the meaning of "*aequitas*" compare my "System der Rechts- und Wirtschaftsphilosophie," vol. 2, pp. 103–108, and the literature there cited [translated in vol. i of the present Series]. Ibidem, page 104: " 'Summum jus, summa injuria,' in this phrase the idea of 'aequitas' is expressed."

progress. This is due to the nature of civilization. Here there is everywhere a continuous flow of evolution. A new development is not altogether new; it does not arise (as it were) out of nothing, but rather it carries forward and gradually changes what already exists. There are additions and alterations, but no radically new creations. The beginnings of an historical deduction of law and the State were to be found already in the political and legal doctrine of the Law of Nature school. The study of historical development, however, was nowhere attempted seriously; historical induction was rather used as a sort of a screen behind which the â priori notions of legal philosophers, who looked at the historical material with preconceived opinions, were ill-concealed. One cannot, to be sure, reasonably blame the writers of that period for their insufficient treatment of history. For in those days history was still a matter of polite literature, not of scientific investigation. The ensuing "Historical School" entered upon the true path when it postulated the historical basis; but it never got beyond the first elements. Its activities were supplanted by the new science of sociology. The merit of sociology is twofold: it called attention to the significance of the social group for the rise and development of law; and further, by making society the central point of law and the State, it impressed upon us the truth that legal conceptions derive life and content from nothing but their actual subject-matter. Out of this comes the recognition that there are close mutual relations between law and economics.[24]

[24] Compare in this connection my "System der Rechts- und Wirtschaftsphilosophie," 5 vols., Munich, 1904–1907. In conjunction with this, and jointly with Josef Kohler, I have founded the "Archiv für Rechts- und Wirtschaftsphilosophie mit besonderer Berücksichtigung der Gesetzgebungsfragen," which now runs in its fourth year. Out of this has grown the "Internationale Vereinigung für Rechts- und

It is here that sociology has rendered service; but the youthful science has also done considerable damage. Striving for "exact investigation" it hit upon the unfortunate idea of trying to transplant the method of natural science into legal and political philosophy. The consequence was that all sorts of amateurish notions choked the germs of a legal philosophy that was in accord with life; and the further consequence was that in general legal and political science nobody so much as attempted to realize the requirements of the historical method.

In this manner it has naturally come about that in the treatment of general problems legal science has to-day sunk to such depths — if I may be pardoned this harsh expression — that, conscious of insecurity and helplessness, it grasps at every straw offered to it. "Balancing of interests," "protection of interests in special need of protection," "protection of society," "social ethics" — these are the catchwords that are made to supply — poorly enough — nearly all the needs of legal philosophy.[25] In this manner both scientific

Wirtschaftsphilosophie samt den Gesetzgebungsfragen," the flourishing success of which is well known. It affords me a peculiar satisfaction to see that my combination of "law and economics," which amounts to a scientific platform, has been taken up by others.

[25] How bad conditions are to-day will appear from a glance at criminal law. In this field, the question: What is the object of punishment? is treated as the fundamental problem of general doctrine; and this question is answered sometimes one way, sometimes another, upon a very scanty historical foundation, and always erroneously. The outcome is that the criminal court, instead of judging according to law and justice, renders some administrative decision, like an administrative officer, in order to reform the offender, to protect society, or to deter others. According to a saying of Grotius, borrowed from the ideas of Scholasticism, punishment is the "malum passionis "which is inflicted in order to equalize the "malum actionis." This pronouncement is still found in the most modern textbooks of the 20th century. As in the tale of the Talisman, all the world admires the beautiful clothes of the King; nobody is willing to be vicious or simple enough to see that in truth there is nothing to be seen — except a meaningless phrase! What has "evil" — an ecclesiastical and ethical concept — to do with the elaboration of criminal law? Or how is it possible that punishment by the State —

inquiry and the administration of the law are loaded down with an excess of sentimental considerations, and are hardly able to bear up under the load.

In contrast to this, we should devote ourselves seriously to the historical study of law and the State, if the science of law, after being freed from the bonds of philology, is to be rescued from aimless wandering and raised to equal rank with other sciences.

What is needed is an historical elucidation of legal concepts, legal devices, and legal rules, with reference to economic evolution. Legal history together with the correlative history of economics, cultivated in this manner, will explain the true essence of those just demands of social ethics that have grown out of the economic exploitation of the working class under the yoke of capitalism, and have for their aim nothing more than the emancipation of those who theretofore, economically speaking, had no rights. Unbiased historical reflection will give us the correct standard for these recent propositions regarding the "right to legal protection" and similar things. It will also give us a guiding rule for a reform of criminal law and procedure, as well as for a correct decision of criminal problems and

as is taught by the prevailing doctrine — has grown out of revenge? If that were really true, surely everybody who reasons consistently and feels humanely would have to proclaim himself a follower of the teachings of Tolstoi!

In public law likewise the notion of a "purpose of the State," inherited from the theory of the Law of Nature, still plays its part. In civil law, "will" in connection with legal transactions still does its metaphysical mischief, just as if law had to do with "wills" instead of persons (the possessors of right) and estates. And in all branches of law legal concepts are not elucidated by historical inquiry, whereby they might be put in the way of further juridical evolution. Rather, they are deduced logically, and only logically; in other words according to arbitrary notions. These arbitrary notions are not those of an individual but an arbitrariness of judges and legal scientists who, in their natural anxiety to find support, are calling on "social ethics" for help, under a vague impression that from the point of view of social ethics the economically weaker party should under any circumstances be protected.

the fixing of punishment. Moreover, and to the present point, historical investigation will also show that the growth of law will result in coercive rules (formal and otherwise) which in the interest of certainty of law must be applied even where in a particular case they appear harsh. Thus it will reveal likewise the proper limitations on the formation of law by "liberty of judicial decision."

§ 6. *The Principle of "Freedom of Judicial Decision" is the Idea of Liberty, i.e., the Elimination from the Law of All Oppressive Action.* The Law of Nature furnished, or attempted to furnish, a legal order, more or less in detail, which was to serve as a model for positive legislation. To-day, however, the only possible aim in developing the principles of "freedom of decision" must be to find limitations and bounds of such principles, "ultrâ quos citrâque nequit consistere rectum," — bounds which ought to be drawn against an inequitable application of the law.

While the Law of Nature established rules of law, "freedom of decision" must confine itself to fixing the exceptions to the general rule, in other words, to showing those principles which must not be violated by application of the law. Thus the function of the principle manifests itself by suspending the established rule in exceptional cases.

Here is an essential difference, both as to substance and function, between the principles of the Law of Nature and "liberty of decision." There is, furthermore, another and fundamental contrast between the means of finding those supra-legal norms of "freedom of decision" that are able to break the established rule, and the method of the Law of Nature. For the latter was, essentially, deductive, while our manner of proceeding must be made inductive. For our object is not to insure that Judge A or Judge B, on the basis of a purely

individual opinion, shall "decide according to the rule which, if he were legislator, he would establish." [26] It is rather, to find, by scientific proof, those objective principles of law which must be complied with under any circumstances, whether the established rule, in letter and spirit, agrees therewith or not.

Legal history proves that principle, from which all the rest must be deduced, to be the idea of liberty.[27] All law implies dominion — dominion of the law. Legal history shows that the primary, essential, and fundamental matter is not the legal norm (command and prohibition) but rather the fixation of positive rights; expressed differently, the transformation, by means of law, of actual relations of power or dominion into legal power or legal dominion.

In primitive ages all dominion is one of religious law. There is provision for a King-priest; sacredness of property; procedure in forms sanctified by religion; extermination under religious sanction of the criminal, who as μίασμα has polluted the commonwealth, by sacrificial death or outlawry.

In the second period of legal culture, dominion has been converted into an ethical form. There is absolute power of tyrant or oligarchs; an absolute claim of creditor against debtor going even as far as a right of killing or enslaving him ("nexum"); unlimited rights regarding property and members of the family; procedure considered as a contest; in criminal law, the principle of retribution.

In the third and — up to the present — last period of civilization the nature of law as a relation of dominion

[26] Swiss Civil Code, art. 1, chapter 2. Compare in this connection, *Rümelin*, "Das schweizerische Zivilgesetzbuch und seine Bedeutung für uns," Tübingen 1908, pp. 31 seq.

[27] Comp. with this and what follows, my "System der Rechts- und Wirtschaftsphilosophie," vols. 1–5, Munich 1904–1908.

and power is preserved in principle but limited and mitigated by synthesis with the ethical idea of liberty.[28]

Under the influence of the notion of liberty (or what means the same thing, the idea of humanity) constantly greater numbers of men, and at last the whole of mankind, are recognized as possessing legal rights, as capable of exercising legal rights, as entitled to be considered by the law as "personae." For this reason every form of enslavement is eliminated from the law: from constitutional law, by abolition of absolute government, establishment of written constitutions and introduction of parliaments; from administrative law, by the responsibility of ministers, administrative courts, and self-government; from criminal law, by the abolition of inquisitorial procedure and cruel punishments. In private law, the prohibition of slavery began at a relatively early time, but emancipation of the debtor proceeded but slowly (remember imprisonment for debt!). At last the most recent age, reaching into the present, has arrived at the comprehension of the connection between law and economics, and that a contract of service, entered into under the forms of freedom of both parties, must frequently result in the economic enslavement of the economically weaker party. Thence arose changes in law which are connected with the movement of social ethics — an expression often vaguely enough conceived. The idea of liberty will be found to be both the cause and the limitation of this infusion of ethics into the law. In pursuance of this idea the established order may be suspended precisely so far, and no farther, than is required to avoid the economic enslavement of those whom that order affects.

[28] *Hegel*, "Grundlinien der Philosophie des Rechts," § 142: "Morality is the idea of liberty. . . ."

From this idea of liberty, without the intervention of a statute, follow the illegality of combinations in restraint of trade that eliminate competition or the freedom of commerce, the illegality of boycotts, the invalidity of a contract of service with excessive hours of labor, and so forth.

The perils of the movement for "freedom of decision" are not to be found in its mere existence. On the contrary that means a step in advance if it implies a recognition of the fact that the "intention of the legislator" is a figment of imagination, and that a slavish adherence to the letter of statutes and rules must lead to the ossification of the administration of justice.

The real danger, and a very considerable one it is, does lie in this, that under the sway of "freedom of decision" the courts will be guided by mere sentiment; and to-day, during the high tide of the movement for social ethics, that sentiment may be downright sentimentality.[29] This danger is increased still more, where it is attempted by means of talk regarding the judges' alleged ignorance of the world[30] [Weltfremdheit] — a phrase as common as it is false — to seduce the judge from his office of administering *justice* into the acquisition of miscellaneous bits of information, which will ever remain mere amateur work. The danger will be heightened immeasurably if the participation of laymen in the work of the courts should be increased still more.[31] Formerly the fundamental right of the citizen was

[29] Compare also the excellent remarks of *Laband*, "Rechtspflege und volkstümliches Rechtsbewusstsein," DJZ, vol. 10, pp. 10–15.

[30] Contra, *Düringer* says well ("Richter und Rechtsprechung," Leipzig, 1909, p. 49): "The authority and reputation of the courts cannot be lessened by an objective criticism of their functions."

[31] Against this, *Sohm* says excellently ("Ueber Begriffsjurisprudenz," DJZ, 14, pp. 1019–1024, 1020, seq.): "We have the learned judiciary and propose to keep it, for the learned judiciary, and that alone, is the pillar of justice, reigning impartially and without regard for persons."

properly adhered to, according to which nobody could be deprived of his day in the ordinary court.[32] The principle of "balancing of interests" will multiply rather than lessen these dangers; for the "weighing of interests" is most easily done by sentiment, and hides at the same time the fact that it proceeds merely from sentiment. Yet even under the rule of freedom of decision, it is the business of the court to administer *justice*.

The court may transcend the bounds set by the letter of the law, but must not do so with the aim of superseding the legislator according to his subjective notions. He should do so rather according to "approved doctrine and tradition,"[33] and be fully imbued with the consciousness that in doing thus, also he is the servant of justice. For law is law and must prevail.

[32] Comp. *Laband*, loc. cit.

[33] "Schweizerisches Zivilgesetzbuch," art. I[III].

CHAPTER VI

JUDICIAL INTERPRETATION OF ENACTED LAW

By Josef Kohler [1]

§ 1. THE REASONS WHY INTERPRETATION IS NEEDED. — § 2. LEGAL INTERPRETATION DISTINGUISHED FROM INTERPRETATION IN GENERAL. — § 3. HOW THE TRUE MEANING IS DISCOVERED. — § 4. INTERPRETATION CHANGING WITH SOCIAL CIRCUMSTANCES. — § 5. AN EXAMPLE OF EFFECTIVE INTERPRETATION. — § 6. THE INTENTION OF THE LEGISLATOR. — § 7. BROAD AND NARROW INTERPRETATION. — § 8. INTERPRETATION OF UNWRITTEN LAW.

§ 1. *The Reasons Why Interpretation is Needed.* To interpret means to look for the meaning and significance behind the expressed words. The necessity for interpretation appears not merely from the consideration that thoughts cannot be communicated except by some external means of expression, but also from this, that frequently thoughts do not become clear and perspicuous in the thinker's own mind until they are expressed. The latter consideration has commonly escaped attention, and a succession of errors has resulted.

To interpret is to discover meaning and significance. It does not concern the meaning and significance of what some person intends to say, but of what is actually said.

[1 From the author's "Lehrbuch des Bürgerlichen Rechts"; Book I, chapter iii, sections 38 to 41. There has also been translated in this Series a complete work of the author on the Philosophy of Law, the editorial preface of which translated volume (xii of this Series) contains an account of the author's life and works. The present translation is by *Ernest Bruncken*.]

It is a common error to believe that thought is a complete slave of our will and never produces anything but what we intend. In reality, thought is quite independent of will and often goes far beyond what the will intended. A thought of this kind is uncertain and indefinite until it becomes clear by being expressed, but even then it remains impossible that all it contains, down to the last and most profound depths, should be apparent at once.

The reason why thought has so wide a background will be found in this, that all our thinking is not merely individual but also social; what we think is not our own product. It is rather something infinite, the product of the mental labors of centuries and thousands of years. It is connected with an infinite number of other thoughts; its concepts are full of ideas of which the thinker himself is not conscious.

Hitherto we have committed a great error in not realizing the sociological significance of legislation. In historical science, the truth has been generally accepted that history is not made by individuals but by society; in the science of legislation, however, we have assumed the person of the legislator to be the exclusive factor. We have entirely overlooked the fact that the legislator is a man of his age, completely saturated with the ideas of his time, completely filled with the civilization surrounding him. We forget that he must work with notions and conceptions taken from the intellectual atmosphere in which he lives; that he must employ words which have a history stretching back for centuries, words the meaning of which is fixed by a sociological process of language-formation that has lasted for thousands of years and lies by no means within the personal choice of the individual. To believe that legislation depends exclusively on the intention of the legislator is evidence of an entirely

unhistorical attitude toward historical processes. Such notions ought to disappear completely from legal science. Hence we may say, statutes are not to be interpreted according to the ideas and intentions of the legislator, but should be interpreted sociologically, as if they were the products of the entire people of which the legislator was but the organ.[2] Such is the meaning of the well-known saying that the law is much wiser than the legislator. The law contains within itself the results of an infinite amount of social labor, so that the maker of a statute is rarely its best interpreter. This has once more been illustrated recently. It would have been a misfortune for our civil code if the interpretation furnished by Planck had to be accepted as a canon for our guidance.

From all this we may infer: (1) Statutes require interpretation because they cannot be communicated except by words, and because the thought is concealed under the word as under a garment; (2) because the thought contained in a statute is only partially clear to the author of the statute, who is no more the master of the thought than thought in other instances is the mere slave of the will; (3) by means of interpretation we may discover a profound, sometimes an almost infinite, significance in a statute. For the thoughts expressed therein are by no means those of its individual author. They are the thoughts of mankind itself, which the legislator merely has given particular form and expression.[3]

§ 2. *Legal Interpretation Distinguished from Interpretation in General.* To what has been said must be added another point: The legislator cannot make laws as a private person, but only in his capacity as legislator.

[2] "Lex nihil aliud est quam ipsa mens." See *Bartolus*, ad fr. 29 de leg.

[3] *George Eliot*, in "Adam Bede," has an apt remark to the effect that the words of a genius are of greater significance than the thoughts which inspired them.

As such he must use the words of a statute. Whatever else he does or says is a private matter and lacks all legislative character. It follows that the only way in which a legislator can act is to express a thought in words, or rather to utter words from which a thought may be gathered. Thus it appears that this matter has another and important aspect.[4] While one might, at first glance, assume that the thought expressed in the statute is the thought that was in the mind of the legislator, but which has an effect more or less independent of the thinker, it appears now that the act of legislation has produced a definite text, and that this text, and nothing else, bears within itself legislative force. If this text conceals within itself four, five, or six different thoughts, any one of which may be gathered from it, the consequence must be that not one thought, but any of these thoughts, whichever may be selected, has been made law. By this it is not intended to say that any one of these five or six thoughts may be arbitrarily picked out, but rather that it is the task of legal technic to select the right one from among these five or six thoughts. What thus lies in the province of legal technic does not also appertain to individual or social psychology. From this it follows that the interpretation of a statute is something different from interpretation in general. Interpreting a statute means not only to find the meaning concealed behind the expression, but also to select from the various meanings which the text may bear that meaning which must be held to be the correct and authoritative one. The process is similar to that in theology, when it becomes necessary

[4] This aspect I had not yet comprehended when I wrote the paper in Grünhut's Zeitschrift, vol. 13, p. 1, but it is already found in the article in Kritische Vierteljahrs-Schrift, n. s., vol. 18, p. 515. There is an excellent dictum in RG March 25, 1891, Entscheidungen, vol. 27, p. 411: "The legislator can use but one form of expression, by enacting a law. What cannot be found in the act is not written law."

to show which among the various meanings that a sacrament or a sacramental formula may have is the meaning corresponding to the truth of salvation.

§ 3. *How the True Meaning is Discovered.* The thought, then, contained in a statute may mean any thought that can be found in it, so that a statute may contain two, three, five, or any number of thoughts, any one of which may possibly be the correct one. The principles of interpretation, therefore, must be fit to help us not merely to find the possible thoughts concealed in the text, but also to select from all possible thoughts found the correct one. There are various tests by which to distinguish the correct thought. Formerly, when I had looked at the matter exclusively from the point of view above described as the first one, I believed that the decisive criterion was the intention, and that the intention in the mind of the legislator could be discovered, more or less definitely, from the motives of those who had promoted the passing of the statute. I no longer believe that this is the most important consideration, although I do not deny that a certain importance attaches to this point of view.

The principal consideration is rather this: Among the possible interpretations of the statute we are to select that which gives to it the most reasonable and salutary meaning, and which will produce the most beneficial effect. It is hardly necessary to justify this proposition; for it is self-evident that legal life prospers best where statutes have the most rational and efficient meaning. The main business of legal science should be to serve legal practice by making the law reasonable. This truth has been obscured by making an idol of subjective interpretation. When this misconception is removed, the truth appears clearly enough. Only when, from this point of view, several meanings are conceivable so that beneficial

results may be expected from one interpretation as well as from another — only then will it be necessary to trace the connections of the various statutory provisions and to prefer that interpretation which will make the statute most consistent with itself and most organically constructed in detail. In such cases we shall have to pay particular attention to the proper relations of the various provisions found in the whole body of the law of the country. For a salutary state of the law means that the several statutes dovetail into each other rather than present a scattering mass of unrelated provisions.

If even this is not sufficient to obtain a clear result, it will be permissible to consider the purpose the law has in view and to inquire what objects, fears, and desires were agitating the community at the time when the law was adopted in order to supply a want felt by society. This also is proper enough; for it is quite right that whenever the other ways of interpretation do not satisfy us we should adopt an interpretation which is not only the most reasonable but which also comes nearest to what the statute had in view.

§ 4. *Interpretation Changing with Social Circumstances.* It follows from all this that the interpretation of a statute must by no means of necessity remain the same forever. To speak of an exclusively correct interpretation, one which would be the true meaning of the statute from the beginning to the end of its days, is altogether erroneous. Such a view misapprehends the purpose of statutes; it deals with them as if they were instruments for understanding the nature of the world instead of means of conferring a benefit upon it. A statute, however, in truth is nothing but a way of bettering conditions, an instrument for attaining certain human ends, for promoting civilization, for repressing

whatever factors are inimical to progress, and for developing the powers of the nation. It is an object of knowledge in so far only as it becomes necessary to recognize its quality of being a changeable and changing instrument of good, or in so far as it is a factor of social development which may have the intended effect on its opposite, and which we must understand in order to judge how and whether it serves its intended purpose. This should be recognized in interpreting a law. The same remedy is bound to have different effects according as there is a change in the circumstances of the times and the surrounding social conditions. To disregard such changes and to insist that a statute must continue to work as of old is like feeding a grown man on the same food as an infant. One might as well legislate for a nation with developed manufacturing industries in the same manner as for a strictly rural community, or recognize no difference between the dusk and the glare of the noonday light. By recognizing that interpretation may change with the times it is possible to give to statutes a certain elasticity, by which they may correspond with changing social requirements and continue to confer benefits on the community even after all the conditions have changed which originally brought about their adoption.

A statute, accordingly, is an instrument for producing beneficial results, and not a social phenomenon to be examined with a view to its truth or falsity. True or false are conceptions that have as little to do with laws as with sociological processes. Such processes take different forms in the various epochs of the history of a people. Just so a legal principle adopted by a people will have to take differing shapes in accordance with time and space. Not to recognize this, to think of a statute as a phenomenon the truth of which has to be sought, and to regard that truth as but a single deduction naturally

flowing from the statute itself — all this is what constitutes scholasticism. The scholastic thinks in terms of being about what should be conceived in terms of action. Instead of trying to find the most desirable effect he is trying to discover the correct effect. Instead of recognizing that there may be a variety of effective meanings he can see but one. That is analogous to insisting that the manners and customs of but a single nation can be the right ones.

Interpretation may change, and cannot but change. For instance, the interpretation of the French Code Civil has, within a hundred years, undergone many changes. All important events in the life of the nation have had their influence on giving direction to its interpretation. By the development of commerce and industry, rules which formerly nobody had ever thought or dreamt of, have arisen out of sections that had not been changed. Thus the whole law of unfair competition has grown out of two sections (sections 1382, 1383) to which originally nobody had been able to ascribe any such meaning.

§ 5. *An Example of Effective Interpretation.* It appears, therefore, that in interpreting a statute one should first look to its reason, then to its logical consistency, and finally to the history of social movements. The following is an example. The statute defines the difference between a design and an invention in such a way that the interpreter may choose from a number of meanings. The reasonable choice would be to find the distinction in this, that the one refers to the utilization of natural forces, the other to an arrangement in space. This form of interpretation will give to industry the best possible protection; it is the most liberal that can be imagined and most capable of promoting the beneficial efforts of industry. By reason of the fact that an arrangement in space comprehends both simple and complicated

forms, such a conception of the subject affords especially an opportunity to protect the same article from different sides, to make it capable of receiving both an invention patent and a design patent. Such an interpretation, moreover, will make our industrial legislation a definite, organic body and enable it to develop in a consistent manner. All other considerations should yield to that. Especially, there is no need of troubling ourselves about the fact that the movement for the adoption of a patent law of designs contemplated no such far-reaching consequences but rather desired to protect new ideas of minor importance which were contrasted with "real inventions." Still less can anything of value in this matter be learned from expressions in preliminary reports or parliamentary speeches. Any interpretation based on such considerations is sure to prove defective and cannot succeed in promoting the just requirements of the industrial world.

§ 6. *The Intention of the Legislator.* The method of interpretation formerly prevailing was nothing but one great error.[5] It failed to recognize that every work of the intellect is the product of social forces, and also that the contents concealed in the written text are of infinite extent, and that the idea contained in it has a life of its own independent of the person who thinks or expresses it. In an attempt to make the idea the mere slave of the will, this method led to the conclusion that whatever the legislator had intended was the law. That, however, is utterly wrong-headed and inconsistent with the history of human thought. As a consequence the actual intellectual content was substantially cut down and nothing of it was accepted as having been actually

[5] The germs of correct notions may be found in *Schaffrath* and *von Hahn;* but Schaffrath's arguments were declared to be actual nonsense by the reviewers, while von Hahn was combated by Goldschmidt and others.

expressed but what the persons connected with the act of legislating had actually comprehended and by an act of will put into effect. The result was a restriction of the law. The place of systematic consistency was taken by historical whims and individual crotchets.

Such a method of interpretation is a mistake even if we assume the legislator to be an absolute monarch whose mere will is law. Truly such a one would be at liberty, after giving a law, to interpret it by a second, declaratory one. Such an interpretation, however, would be effective not because it made plain the thought of the first act, but because it is a new act. If, however, the constitution of the government were such that even this absolute ruler were at least bound to observe some form, such as for instance publication, before his will became law, it would follow that at least his private writings or diaries could not be used to help interpreting his act.

In our modern constitutional States, however, where there are several coördinate branches of the legislative power, this method is quite intolerable. Here, whenever a law is adopted, all that is really agreed upon is the words. For among those who have anything to do with the passage of the act frequently something different is understood by each. Even within one of these various bodies that must give their assent, there may be several groups or parties, each understanding something different by the same words and agreeing only because of their different understanding. If one were to insist seriously, in such cases, that the intention of the legislators must be followed, one would have to arrive at the conclusion that on account of the different meanings attached to the words by different members of the legislative body the act had really not been adopted at all. That is so absurd a conclusion that it is at once rejected, although there have been a few fanatics of logical consistency who have

actually dared to accept such a result. The only way out of this dilemma was by fictions and arbitrary assumptions. Especially this assumption has been a favorite, that anything stated in the "motives" [6] of the Government and not expressly denied by parliament is taken for agreed. It is also said that anything asserted by a member and not contradicted must be held to be the unanimous sense of parliament. Such theories resulted in the most startling exaggerations of the importance attached to the preliminary utterances made regarding an act before its passage. These propositions, however, are all wrong. Whether a thing is said or not in debate depends on many accidents. More importance than to any intention to agree, may have to be attached to the fact that a voluble orator suffered with catarrh, that some member of the opposition had liver complaint, or that the attractions and diversions of the capital were too strong for others. Surely it would be a strange method of interpretation by which the validity of law might depend on some parliamentarian's state of digestion. Many a speech was left undelivered on account of the carrying of the previous question, or because some member suffered with fatigue, or because he was kept in conversation in the lobby. When you take a look at actual life, all logical devices of the sort described are seen to be futile.

Accordingly, declarations in reports or the debates in parliament cannot be of much importance for discovering the true meaning of the law; at most they may serve to show the state of public opinion or the wishes of substantial elements of the people. As far as that goes, however, such declarations are no more significant than any

[6] ["Motive" is the term given in German parliamentary practice to the explanatory report accompanying a bill introduced by the Government.— TRANSL.]

other evidence of what the public are thinking about. Some article in a newspaper, or some book that exercises a determining influence on public opinion, may often be of far more importance for such a purpose than anything said in debate or reports. The publication of such debates and reports may be interesting because the state of feeling and opinion is reflected therein, which is always instructive from a general point of view. For the interpretation of the statute, no particular importance ought to be attached thereto. The danger of abuse of these publications is constantly greater than any utility they may have. Therefore it would be better always to let the statute be promulgated without allowing the public to see any of the preliminary reports. This would seem desirable in connection with any statute, but especially in regard to the Civil Code, the report of the preliminary discussions on which is not even official and is poorly worked out in every respect. The Supreme Court says about this report[7]: "Moreover, the report . . . cannot be decisive of the true meaning of the statute. It is a private work and does not originate with the legislative power. It was not intended, nor is it authorized, to declare the meaning of the statute." Now, then, why was that report ever published?

§ 7. *Broad and Narrow Interpretation.* The principle expressed in the statute works within the words, as the motive power within the machine. Just as there are sometimes found inert parts of a machine, which are not in due proportion to the power to be developed and consequently are but a hindrance and obstacle to its proper functioning, so there may be inert parts in the text expressing a statute. It may be that a statute contains two ideas, if all expressions are taken in their natural

[7] Decision 51, p. 274 (May 3, 1902).

meaning. If, however, one or more of these expressions are taken in a metaphorical sense, or if one broadens some term beyond the ordinary meaning, or contracts to a narrower sense, possibly there may be six more ideas found in its provisions. Now the problem arises whether a lawyer may in such a case elect to consider these additional meanings also, assuming that for once the mode of expression chosen has been metaphorical, awkward, and unusual. The answer will have to be in the affirmative. For, as in ordinary daily life, so also in the statutes the mode of expression selected is by no means always the most ordinary, trite, and literal. If one were to use words always in the most common and overworked sense, the language of the statutes would lose all individuality and become schoolmasterly, stiff, and pedantic. Moreover, a wooden style, careful to give to each word the exact sense of daily conversation, would frequently be incapable of expressing some significant idea at all, or at least only by horrible circumlocutions and tortuous clauses. This would make the statute so awkward as to resemble some linguistic monster. Witness here the form of English statutes which are often absolutely astonishing in this respect. Now this ought never to be the case; for a statute ought to be also a literary work of art, so as, to some extent at least, to enter into the conscious memory of the people. Otherwise it can never become part and parcel of the popular mind but must remain strange and repellant. That, however, would work great injury to the legal education of the people.

From all this we may draw the following conclusion: in selecting the true meaning, the lawyer must bear in mind that the words may perhaps be metaphorical and unusual, so as to express their full meaning only approximately if taken literally; very much as one trying to explain the functions of a machine must bear

in mind that the machine may have imperfections, possibly for no reason but because it had been put together in a hurry, or because a greater degree of precision was not required.

It is customary to speak of broad and narrow interpretation. These, however, are but special cases. In other ways also the expression may fail to cover the meaning exactly, both in respect of quantity and quality. One ought, therefore, to speak not merely of broad or narrow interpretation, but rather of interpretation which gives to the statute a significance apart from the inexact expressions of the text. This significance may be greater or less than the words may express, but it is also possible for it to change qualitatively. That would be a poor interpretation which could at most stay more or less within the literal text but could never go entirely beyond the literal meaning and introduce a new significance. For instance, where a statute speaks of "objection," we must be permitted to attach to the word "objection" in a given case a meaning other than the ordinary legal significance. We may conclude that the term is used untechnically and may include the rescission of a contract. Another illustration is the term "relative invalidity" of a patent. As used in the patent statute it does not mean invalidity at all but something entirely different.[8]

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§ 8. *Interpretation of Unwritten Law.* It is not only the written but also the customary law which requires interpretation; but the method is quite different in the latter. Here it becomes necessary to gather from the various rules of customary law the principle, and to test by this principle the true nature of any particular usage. Above all in the case of the customary practice of the

[8] See my "Handbuch des Patentrechts," pp. 396 seq.

courts will the interpreter have to consider what reason lies at the bottom of any decision. Perhaps two or three reasons are given in an opinion, and one of these is based on the customary practice. The question will then arise whether the custom is the real reason which led the court to decide as it did, or whether it was nothing but a more or less weighty consideration which merely influenced but did not determine the decision. This is the way in which the opinions of the courts are interpreted in England and America, in order to discover whether some rule is authoritatively enunciated. At the same time, the question is then considered whether such rule is applicable only to the particular state of facts found in the case at bar, or whether it is of so general a nature as to apply also, even though one or the other of the details of fact were lacking.

CHAPTER VII

COURTS AND LEGISLATION

BY ROSCOE POUND[1]

Let me begin with a quotation:

"[There] is no doubt but that our law and the order thereof is over-confuse[d]. It is infinite and without order or end. There is no stable ground therein nor sure stay; but every one that can color reason maketh a stop to the best law that is before time devised. The subtlety of one serjeant shall [make] inert and destroy all the judgments of many wise men before time received. There is no stable ground in our common law to lean unto. The judgments of years be infinite and full of much controversy. . . . The judges are not bound to follow them as a rule, but after their own liberty they have authority to judge, according as they are instructed by the serjeants, and as the circumstance of the case doth them move. And this maketh judgments and processes of our law to be without end and infinite; this causeth suits to be long in decision. Therefore, to remedy this matter groundly, it were necessary in our law to use the same remedy that Justinian did in the law of the Romans, to bring this infinite process to certain ends, to cut away these long laws, and by the wisdom of some politic and wise men institute a few and better laws and ordinances."[2]

[1] [Carter Professor of Jurisprudence in Harvard University, and member of Editorial Committee for this Series. Address delivered before the American Political Science Association at Buffalo. December 28, 1911. Reprinted from the American Political Science Review, vol. vii, no. 3, pp. 361 seq., August 1915. Some additions have been made to the notes.]

[2] *Maitland*, "English Law and the Renaissance," 42.

Such are the words Starkey puts into the mouth of Reginald Pole in a dialogue submitted to Henry VIII. If in large part they have a familiar sound, and need only a dress of modern English to pass for a clipping from a recent periodical, an emanation from the American legal muckraker, it is partly because the relation of judging to lawmaking is a perennial problem and partly because that time was (as the present is also) a period of legislation following upon one of common law. In a later period of legislative activity, after an ineffectual attempt to reform the law and procedure of England, Cromwell was forced to say, referring to bench and bar, "the sons of Zeruiah are too hard for us." In still a later period of legislation, the period of the legislative reform movement, Bentham was wont to say that the law was made by "Judge & Company"[3] — i.e. by the bench and bar — and to accuse the lawyer of chuckling "over the supposed defeat of the legislature with a fond exultation which all his discretion could not persuade him to suppress." To-day the relation of courts to legislation has become a world-wide question, following the development of legislative lawmaking through modern parliaments. On the Continent the last decade has seen the rise of a great juristic literature upon the subject. Whether, as in France, new demands are made upon old codes, which have acquired a settled gloss of doctrine and jurisprudence, or, as in Germany, the principles of a new code await juristic development at many important points, or, as in the United States, a rapidly growing body of written law is adjusting to a stable and none too flexible body of traditional principles, — under one name or another, juridical method has become a chief subject of discussion. Even our problem of judicial power with respect to unconstitutional legislation has ceased

[3] "Works" (Bowring edition), v. 369.

to be local. *Marbury* v. *Madison* has been cited and followed by a court of Roman-Dutch lawyers in South Africa.[4] With the adoption of a written constitution, the subject has become acute in Australia and Australian courts and lawyers are insisting upon the American doctrine in the face of a decision of the Privy Council in England to the contrary.[5] If we bear in mind that the relation of courts to legislation is neither a new question nor a local question, we shall be able to look upon more than one aspect of the matter with greater equanimity.

According to the beautifully simple theory of separation of powers three wholly distinct departments have for their several and exclusive functions to make laws, to execute laws, to apply laws to controversies calling for judicial decision. It is a commonplace that a complete separation of this sort has never existed anywhere and that the lines, as we draw them in our constitutional law, are historical rather than analytical. But the theory itself, so far as it confines the judicial function to mere application of a rule formulated in advance by an extra-judicial agency, proceeds upon an eighteenth century conception of law and of lawmaking which we cannot accept to-day.

Jurists of the eighteenth century had no doubt that a system of law, complete in every detail, might be constructed for any country by any competent thinker by deduction from abstract principles. They thought of

[4] *Brown* v. *Leyds*, 14 Cape Law Journal, 94; "The Courts and the Legislature," 14 Cape Law Journal, 109; "The Judicial Crisis in the Transvaal," 14 Law Quarterly Rev. 343. Cf. a similar case in Roumania, 6 Am. Pol. Sci. Rev. 456.

[5] *Deakin* v. *Webb*, 1 Com. L. R. 619; *Baxter* v. *Com'rs*, 4 Com. L. R. 41, 63, 81; *Cooper* v. *Com'r*, 4 Com. L. R. 1304; *Federated Ass'n* v. *New S. W. Ass'n*, 4 Com. L. R. 488; *Rex* v. *Barger*, 6 Com. L. R. 41, 63, 81. See *Webb* v. *Outrim*, [1907] A. C. 81; *Moore*, "The Commonwealth of Australia" (2 ed.), chap. 4. Cf. *In re Award*, 26 New Zealand S. C. 394.

the legal system as a structure which might be built over again at pleasure in accordance with one's ideal of right. Hence their conception of legal science was a discovery and formulation of this ideal, as something unchangeable and independent of human recognition, whereby they might hand over to the legislator a model code, to the judge a touchstone of pure law, to the citizen an infallible guide to conduct. So long as men believed in this absolute natural law, they were justified in laying down that it was for the legislator to discover and enact this model code and for the judge simply to apply it. And even after they ceased to believe in it, two theories which had great currency served to keep alive the resulting conception of the judicial function. One was the tradition of absolute legal principles, discovered and applied by courts, but existing prior to and independent of all judicial decision. Laid down by Blackstone, this notion that judicial decisions were merely evidence of law, or of that part of the law not evidenced by statutes, was accepted as a fundamental proposition. Austin characterized it justly as "the childish fiction, employed by our judges, that judiciary or common law is not made by them, but is a miraculous something, made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges."[6] Historically, it represents the Germanic conception of law, the "sighing of the creature for the justice and truth of his creator"[7] which, Heusler tells us, is to be found in every law book of the middle ages. Such a tradition, well established in the eighteenth century, lent itself at once to the juristic theory of that time and to the resulting theory of the judicial office. Moreover, it was reinforced presently from another quarter. After the historical jurists had overthrown

[6] "Jurisprudence" (4 ed.), 655.

[7] "Institutionen des deutschen Privatrechts," § 1.

the eighteenth century juristic theory, they acquiesced in a learned tradition on the Continent which confined historical study to the texts of the Roman law and they created a learned tradition in America which confined the jurist to the classical common law. Accordingly, ostensibly the judicial function remained purely one of application. Men differed only as to what was to be applied. To some it was the command of the sovereign, expressed normally in legislation. To others it was natural law, which might at any time be revealed as a whole to the legislator and promulgated in a code. To others it was the principles of the common law, evidenced by prior decisions or declared by statutes. To others it was the body of legal principles implicit in the sources to which the learned tradition confined historical study and derived therefrom by legal reasoning. In any event it was assumed that the judge in every sort of case merely applied a rule which had a prior independent existence.

A German writer has put the received theory thus: The court is an automaton, a sort of judicial slot machine. The necessary machinery has been provided in advance by legislation or by received legal principles, and one has but to put in the facts above and draw out the decision below. True, he says, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed not at all to the thumping and joggling process but solely to the machine.[3] It goes without saying that such a conception of the process of judicial decision cannot stand the critical scrutiny to which all legal and political institutions are now subjected. Men insist upon knowing where the preëxisting rule was to be found before the judges discovered and

[3] *Kantorowicz*, "Rechtswissenschaft und Soziologie," 5.

applied it, in what form it existed, and how and whence it derived its form and obtained its authority. And when, as a result of such inquiries, the rule seems to have sprung full-fledged from the judicial head, the assumption that the judicial function is one of interpretation and application only, leads to the conclusion that the courts are exercising a usurped authority. The true conclusion is rather that our theory of the nature of the judicial function is unsound. It is a fiction, born in periods of absolute and unchangeable law. If all legal rules are contained in immutable form in holy writ or in twelve tables or in a code or in a received corpus juris or in a custom of the realm whose principles are authoritatively evidenced by a body of prior decisions, not only must new situations be met by deduction and analogical extension under the guise of interpretation, but the inevitable changes to which all law is subject must be hidden under the same guise. To-day, when all recognize, nay insist, that legal systems do and must grow, that legal principles are not absolute, but are relative to time and place, and that juridical idealism may go no further than the ideals of an epoch, the fiction should be discarded. The analytical jurists did a great service to legal science when they exposed this fiction, though their conclusion that a complete code should be enacted in order to put an end to the process of judicial lawmaking shows that they saw but half of the truth. For the application of law is not and ought not to be a purely mechanical process. Laws are not ends in themselves; they are means toward the administration of justice. Hence within somewhat wide limits courts must be free to deal with the individual case so as to meet the demands of justice between the parties. Any considerable narrowing of these limits, any confining of the judicial function by too many hard and fast rules, soon defeats the purpose

for which law exists. Application of law must involve not logic merely but a measure of discretion as well. All attempts to eradicate the latter element and to make the law purely mechanical in its operation have ended in failure. Justice demands that instead of fitting the cause to the rule, we fit the rule to the cause. "Whoever deals with juristic questions," says Zitelmann, "must always at the same time be a bit of a legislator"[9]; that is, to a certain extent he must *make* law for the case before him.

Our first step, then, in considering the relation of courts to legislation, must be to analyze the judicial function.

Judicial decision of a controversy, the facts being ascertained, has been said to involve three steps: (1) finding the rule to be applied, (2) interpreting the rule, (3) applying the rule to the cause. The first process may consist merely in laying hold of a prescribed text of code or statute, in which case it remains only to determine the meaning of the rule and to apply it. More commonly the first process involves choice among competing texts or choice from among competing analogies, so that the several rules must be interpreted in order that intelligent selection may be made. Often such interpretation, using the term to mean a genuine interpretation, shows that no existing rule is adequate to a just decision and it becomes necessary to provide one for the time being. The rule so provided may or may not become a precedent for like cases in the future. In any event, this process has gone on and still goes on in all systems of law, no matter what their form and no matter how completely in their juristic theory they limit the function of adjudication to the purely mechanical.

[9] *Zitelmann*, "Die Gefahren des bürgerlichen Gesetzbuches fur die Rechtswissenschaft," 19.

Perhaps the classical instance of the process referred to is to be found in article 5 of the French Civil Code. That article reads as follows: "Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision." Its purpose was, as we are told by an authoritative commentator, to prevent the judges from forming a body of case-law which should govern the courts and to prevent them from "correcting by judicial interpretations the mistakes made in the [enacted] law."[10] After a century of experience in the endeavor to carry out this purpose, French jurists are now agreed that the article in question has failed of effect. To-day the elementary books from which law is taught to the French students, in the face of the code and of the Roman tradition, do not hesitate to say that the course of judicial decision is a form of law.[11]

All of the three steps above described are commonly confused under the name of interpretation, because, in primitive times, when the law is taken to be God-given and unchangeable, the most that may be permitted to human magistrates is to interpret the sacred text. The analytical jurists first pointed out that finding a new rule and interpreting an existing rule were distinct processes, and Austin distinguished them as spurious interpretation and genuine interpretation respectively, since his belief in the possibility of a complete body of enacted rules, sufficient for every cause, led him to regard the former

[10] *Laurent*, "Droit civil Français," i, §§ 250–262.

[11] *Baudry-Lacantinerie*, "Précis de droit civil" (8 ed.), preface; *Capitant*, "Introduction à l'étude du droit civil" (3 ed.), 30 ff. See also *Demogue*, "Notions fondamentales du droit privé," 216 ff.; *Esmein*, "La jurisprudence et la doctrine," Revue trimestrielle de droit civil, i, 1; *Saleilles*, "Le code civil et la méthode historique," "Livre du centennaire du code civil," i, 97; *Gény*, "Méthode d'interprétation," §§ 39–59. [See also ch. i supra.]

as out of place in modern law.[12] Indeed he was quite right in insisting that spurious interpretation *as a fiction* was wholly out of place in legal systems of to-day. But experience has shown, what reason ought to tell us, that this fiction was invented to cover a real need in the judicial administration of justice and that the providing of a rule by which to decide the cause is a necessary element in the determination of all but the simplest controversies. More recently the discussions over the juridical handling of the materials afforded by the modern codes has led Continental jurists to distinguish application of rules to particular causes from the more general problem of interpretation. Indeed, under the influence of the social-philosophical and sociological jurists, who have insisted that the essential thing in administration of justice according to law is a reasonable and just solution of the individual controversy, application of law has become the central problem in present-day legal science.

Given the three steps in the decision of causes, as courts now proceed, namely, finding of rules, interpretation of rules, and application to particular controversies of the rules when found and interpreted, let us consider the relation of the courts to legislation with reference to each.

It has been a favorite notion of legislators that the finding of law could be reduced to a simple matter of genuine interpretation; that a body of enacted rules could be made so complete and so perfect that the judge would have only to select the one made in advance for the case in hand, interpret it and apply it.[13] As has been

[12] "Jurisprudence" (4 ed.), 1026–1036. See my paper, "Spurious Interpretation," 7 Columbia Law Rev. 379.

[13] "These decisions leave the legitimate business of the country in a condition of uncertainty. . . . This condition I have met by a bill which I have introduced in the Senate. It enumerates in plain

said, this was the eighteenth century idea. Thus in the code of Frederick the Great the "intention was that all contingencies should be provided for with such careful minuteness that no possible doubt could arise at any future time. The judges were not to have any discretion as regards interpretation, but were to consult a royal commission as to any doubtful points, and to be absolutely bound by their answer. This stereotyping of the law was in accordance with the doctrines of the law of nature, according to which a perfect system might be imagined, for which no changes would ever become necessary, and which could, therefore, be laid down once for all, so as to be available for any possible combination of circumstances."[14] Bentham and Austin, who saw clearly enough that the doctrine of natural law of the eighteenth century was untenable, none the less had the same idea of the possibility of a perfect code, stating the existing law in complete detail. Accordingly Austin named as a defect of the French Civil Code what has proved to be the chief source of its success, namely, that it was not intended to be complete but was intended to be supplemented and explained by various subsidia.[15]

As we know, the historical school overthrew the notion that there could be a complete and final legislative statement of the law. Unhappily the historical jurists went too far in the opposite direction. They assumed that conscious human effort to shape and so to improve the

English every known practice and expedient through which combinations have stifled competition, and prohibits anyone from engaging in them." — Senator *La Follette* in American Magazine, July, 1912.

[14] *Schuster*, "The German Civil Code," 12 Law Quarterly Rev. 17, 22. As to this notion of authentic interpretation, the maxim "eius est interpretari legem cuius est condere" and the breakdown of non-judicial interpretation by legislative bodies and royal commissions, see *Gény*, "Méthode d'interprétation," §§ 40–45.

[15] "Jurisprudence" (4 ed.), 695.

law was futile. They conceived that the law developed through the development of the genius of a people and its gradual expression in legal institutions. Hence they took it to be the duty of the jurist to study the course of this development and to trace its effects in existing legal systems, but in no wise to attempt to interfere therewith, since to essay conscious lawmaking was to attempt the impossible. For many reasons this theory became very popular in America, and to a large extent it still holds its ground with us, after it has been rejected elsewhere in consequence of the rise of the social-philosophical jurists. Thus we have two conflicting theories of the relation of courts to lawmaking. On the one hand, the older, analytical theory, heir in this respect to the eighteenth century, holds that a complete legislative statement of the law upon any subject may be made in advance, and that judicial lawmaking is abnormal and due only, so far as it may be justified, to defects in the legislative prevision. On the other hand, the historical theory regards such legislative attempts as useless, as attempts to make what cannot be made, and hence looks upon development of the law by juristic speculation and judicial decision as the normal and on the whole the only practicable method. Neither of these theories expresses the whole truth. But the rise of modern legislation and resulting imperative notions of law serve to keep alive the former, while the exigencies of administering the modern codes upon the Continent and experience of applying modern statutes in England and America serve to keep alive the latter, in one form or another, as a tenet of the legal profession. For instance, it is justly thought a merit of the new German Civil Code that it makes no attempt to be a perfect code in the eighteenth century sense. But there are German expositors of the code who object to its generality and to the margin for

development which it leaves and accuse it of being a mere institutional textbook.[16]

In truth the changed attitude toward legislation involved in the breakdown of Savigny's historical school, much as it is to be welcomed in that it gives us much-needed faith in the efficacy of effort in improvement of the law, is bringing about a return to absolute theories of lawmaking which in more than one respect is unfortunate. It has been said truly that the activity of legislatures is a fundamental fact of modern law. Demos will legislate, and any theory that seeks to put a check upon this activity will dash in vain against obstinate facts. But it is no less true that much if not most of this legislative activity will prove futile, as most of it has proved in the past, so long as it proceeds upon the assumption that legislators may lay out a full and complete scheme in advance, which will suffice for all controversies, so long as it assumes that the general principles of the law and the rules and doctrines of the legal system into which the legislative enactment is to be fitted and in which it must take its place may be neglected, and so long as it proceeds upon the idea that arbitrary expressions of the sovereign will may be given the quality of law by a prefatory "be it enacted." A lesson of legal history which must be learned both by legislators and by courts is that the lawmaker must not be over-ambitious to lay down universal rules.

Since the fundamental idea of law is that of a rule or principle underlying a series of judicial decisions, it is obvious that the power of finding the law, which a tribunal must be allowed to exercise, is to be governed by some sort of system, or we shall have a personal rather than a

[16] *Endemann*, "Lehrbuch des bürgerlichen Rechts," i, § 5. See *Crome*, "System des deutschen bürgerlichen Rechts," i, §§ 9, 11; *Kohler*, "Lehrbuch des bürgerlichen Rechts," i, § 1.

legal administration of justice. The first conscious attempt to provide such a system is usually a complete scheme of legislation. But such schemes are soon outgrown and are never wholly sufficient. Hence three purely juristic methods of systematizing the judicial finding of law have arisen. (1) First we may put what has been called a jurisprudence of conceptions. Certain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process. The merit of this method is that it leads to certainty, and whenever, as in the nineteenth century, the demands of business and of property are paramount, this method is the prevailing one. (2) A second method is to take the rules of a traditional system or the sections of a legislative system as premises and to develop these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social conditions of the time being. Just now Continental legal literature is full of suggestions as to the manner in which such a method should be worked out. (3) A third method is the purely empirical one of our Anglo-American law; as Mr. Justice Miller put it, the process of judicial inclusion and exclusion. This method, in appearance crude and unscientific, is none the less justified by its results. It is, in truth, the method of the natural scientist, of the physician and of the engineer, the method of trial-hypothesis and confirmation. The tentative results of â priori reasoning are corrected continually by experience. A cautious advance is made at some point. If just results follow, the advance goes forward and in time a rule is developed. If the results are not just, a new line is taken, and so on until the best line is discovered. With all its defects, this method has stood the test of use better than any other. Speaking

of this method and of its results in English law, Kohler, who must be pronounced the leader among modern jurists, says: "Their science does not go beyond the few necessary beginnings, yet their administration of law far surpasses ours."[17]

If judicial finding of law cannot be obviated by any complete scheme of legislation and may be systematized sufficiently by known juristic methods, it would seem that legislation ought to seek chiefly to provide new and better premises from which courts may proceed rather than to tie the courts down rigidly by a mass of rules. This providing of new and better premises is a possible task and a needed one in all periods of transition. The slow growth of the law by judicial inclusion and exclusion and discovery of the sound rule at the expense of many litigants becomes intolerable in such periods. At many points a more rapid adjustment of the legal system to the needs of the community becomes imperative. Moreover, it happens too often in our Anglo-American case law that through over-ambition of our courts to lay down universal rules our empirical method is replaced in many portions of the legal system by a jurisprudence of conceptions. In such cases, new premises may be required because society cannot await the gradual shifting process which would otherwise bring about a readjustment of the law. But two points are to be observed in this connection.

In the first place, the legislator must bear in mind that his enactment will not stand alone. It must take its place in and become a part of an entire legal system. Hence he must not neglect the relation which his statute will bear to the general body of the law. Rules cannot stand alone in a legal system. So long as human foresight is finite and the variety of human actions infinite,

[17] Geleitwort to *Rogge*, "Methodologische Vorstudien zu einer Kritik des Rechts," iii.

legal reason must be the measure of decision of a great part of the causes that come before courts. This legal reason, exercised in one of the three ways we have considered, postulates a system of rules or principles. Disturbance of this system produces corresponding disturbance of the course of legal reasoning, and sooner or later the disturbing element yields to the general system or else the system gives way thereto. In any event, nothing has so profound an effect upon the practical workings of an enactment as its relation to the legal system into which it is to be set and the mode in which its adjustment thereto has been studied and provided for. This is a matter of much more moment than provision for every detail of application that may be foreseen.

The second point to observe is that this legitimate function of judicial adjustment of legislation to its surroundings in the legal system is liable to abuse and has been abused in American law in the immediate past. The old law and the new element ought to be and in the end must be made to accord in a legal system. But this does not mean that the new element is to be judged with suspicion, to be held down rigidly to the mere letter of its provisions, and to be distorted by the reading into it of all the dogmas of the old law not inconsistent with its express terms. Unhappily a tendency of this sort was manifest at one time and has not wholly disappeared. Many things combined to produce such a tendency in nineteenth century American law; the poor quality of much of our state legislation, the analytical theory that law is made and its American form that law is what the courts decide it to be, the relations of judge and legislator in a system in which the judiciary in finding the law may test the validity of statutes by constitutional provisions, the traditions of a legal system which preserved many memories of the Germanic conception

of a body of rules beyond reach of human change, and above all a notion of the finality of common-law doctrines derived in part from the Germanic tradition and in part from the later conception of natural law, and fortified by the doctrine of the historical school as to the futility of conscious lawmaking. Most of the friction between courts and people has been due to this notion of the finality of the law on the one hand and the notion of the finality of legislative power on the other hand.

Let us look at this feature of the relation of courts to legislation more closely.

Settled habits of juristic thought are characteristic of American legal science. Our legal scholarship is chiefly historical. Our professional thinking upon juristic subjects is almost wholly from the point of view of eighteenth century natural law. In either event, it begins and ends substantially in Anglo-American case-law. Understand me, I do not for a moment underrate this inheritance of judicial experience in the adjustment of individual relations and disposition of concrete disputes. But I deny that it contains anything beyond such experience in any other sense than all experience may be made to disclose principles of action. Yet our jurists of both schools have claimed much more for it. It has been shown more than once that our historical school has given us a natural law upon historical premises. It has made the fundamental conceptions of our traditional case-law into fundamental conceptions of all legal science. Thus it has set up a fixed, arbitrary, external standard by which all new situations and new doctrines are to be tested. This school has had an almost uncontested supremacy in our legal scholarship. In the profession at large and in the law schools dominated by the practitioner, substantially the same result in juristic thinking is reached in another way. Except as they have come from the

halls of a few of our great law schools, lawyers and judges have been trained to accept the eighteenth century theory of natural law. Until a date comparatively recent, all legal education, whether in school or office began with the study of Blackstone. Probably all serious office study begins with Blackstone, or some American imitator to-day. Our latest and most pretentious institutional book lays down the natural law conception without a hint that any other might be tenable. Some law schools still make Blackstone the first subject of instruction. In others, Blackstone is a subject of examination for admission or of prescribed reading after admission, or there are courses in so-called elementary law, in which texts reproducing the juristic theories of the eighteenth century are the basis of instruction. Thus scholar and lawyer have concurred in what became for a time a thoroughgoing conviction of the American lawyer, that the doctrines of the common law are part of the universal jural order. When he spoke of law, he thought of these doctrines. He held that constitutions and bills of rights are declaratory of them. He construed statutes into accord with them. Through the power of the courts over unconstitutional lawmaking, he forced them upon modern social legislation. When, to use the words of Bracton and of Coke, he reminded the sovereign people that it ruled under God and the law,[18] he meant that these doctrines which were conceived of as going back of all constitutions and beyond the reach of legislation, were to be the measure of State activity. But the fundamental conceptions of Anglo-American case-law are by no means those of popular thought to-day. Being alien in many particulars to current notions of justice and often out of touch with the economic and social thinking of the time, it is not likely that these principles would be

[18] "Prohibitions del Roy," 12 Rep. 63.

acquiesced in wholly even if there were no positive force to counteract them. Such a force there is. For the popular theory of sovereignty, what one may call the classical American political theory, is quite as firmly rooted in the mind of the people as the eighteenth century theory of law is rooted in the mind of the lawyer. The layman is taught this political theory in school, he reads it in the newspapers, he listens to it on the Fourth of July and from the stump and from Chautauqua platforms, and he seldom or never hears it questioned. In consequence, he is as thoroughly sure of it as is the lawyer of his juristic theory. If the lawyer is moved to stigmatize all that does not comport with his doctrine as lawlessness, the people at large are moved to stigmatize all that does not comport with their theory as usurpation.

While the lawyer believes that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made, the people believe no less firmly that it may be made and that they have the power to make it. While to the lawyer the State enforces law because it is law, to the people law is law because the State, reflecting their desires, has so willed. While to the lawyer law is above and beyond all will, to the people it is but a formulation of the general will. Hence it often happens that when the lawyer thinks he is enforcing the law, the people think he is overturning the law. While the lawyer thinks of popular action as subject to legal limitations running back of all constitutions and merely reasserted, not created, thereby, the people think of themselves as the authors of all constitutions and limitations and the final judges of their meaning and effect. This conflict between the lawyer's theory and the politician's theory weakens the force of law. The lawyer's theory often leads him to pay scant attention to legislation or to mold it and warp it to the exigencies of what he

regards as the real law. But to those who do not share his theory, this appears as a high-handed overriding of law, and the layman, laboring under that impression, is unable to perceive why the lawyer should have a monopoly of that convenient power. On the other hand, the people's theory that law is simply a conscious product of the human will tends to produce arbitrary and ill-considered legislation impossible of satisfactory application to actual controversies.

Hence, I take it, absolute theories, derived from the eighteenth century, are the principal source of friction in the relation of courts to legislation. Already the causes of this friction are disappearing, and the resultant difficulties in our legal system are going with them. More careful legislation, proceeding upon better lines and based upon better understanding of what legislation may achieve and should attempt on the one hand and the disappearance on the other hand of the notion of the finality of the common law are now things, if not of the present, certainly of the immediate future. And at the same time the judicial attitude toward legislation has changed visibly. Comparing the reports of the decade from 1880 to 1890 with the reports of to-day, this change becomes very striking, and a progressive liberalization is manifest as one looks over the decisions from 1890 to 1910. On the whole the movement is going forward more rapidly in the courts than in the legislatures, though some states here are conspicuous exceptions. Not a little modern social legislation, as it is too often enacted, will call for the highest powers of the strongest judges that can be put upon the bench, if we are to make it effective as part of a legal system.

Turning now to interpretation, I must make it clear at the outset that I refer to genuine interpretation, to a genuine ascertainment of the meaning of the legislative

provision. This problem, however, is so closely connected with the more difficult one of application of the provision to the cause in hand that to some extent we may look at them together. In the past the whole complex of problems, finding a rule to apply, interpreting the rule when found, and applying it, has been called interpretation. This has led to an impression that *all* interpretation involves the legislative and personal element which belongs only to the finding of law. Hence the present popular demand that our courts go to the extreme in spurious interpretation of constitutional provisions while at the same time complaint is made that statutes are nullified by the ordinary process of finding and applying the law. We cannot keep before us too clearly that finding the law — if you will, judicial lawmaking — is one thing, and true interpretation quite another. In dealing with statutes, since from the nature of the case all causes could not be foreseen, this finding the law or judicial lawmaking or spurious interpretation is necessary unless we would have the court decide by throwing dice or casting lots. But in constitutional law, where the issue is simply whether the legislative act must yield to the supreme law of the land embodied in a constitutional provision, the question can only be one of genuine interpretation. In the first decision upon the legal tender act, indeed, and in other cases occasionally, implied limitations upon legislative power have been derived by analogy. But such implied limitations, if they exist, must be implied in fact. The idea of a prescriptive constitution, of principles running back of all governments of which bills of rights are but declaratory, is only another phase of the idea of natural law, and in its application means simply the finality of an ideal development of the fundamental principles of the common law. In many of our state courts this idea has been

the bane of constitutional decisions upon provisions of the bills of rights. Indeed it has some warrant in the notions of those by whom the bills of rights were framed, and if these were statutory provisions, the position that they might be extended analogically as being declaratory of common-law doctrines might be well taken. For our bills of rights represent the eighteenth century desire to lay down philosophical and political and legal charts for all time, proper enough in men who believed they had achieved finality in thought in each connection. The first period of our constitutional law was under the influence of these ideas. But legislatures at that time were willing to be guided by the prescribed charts and would have conformed thereto had there been no such constitutional provisions. The chief complaint during this period was that the courts extended the possibilities of governmental action by interpretation; for example, that they allowed the federal Government to do much which it was denied the constitution had granted thereto. Later, a period of vigorous legislation upon social subjects began and the complaint changed. Now it is urged that the interpretation of courts is too narrow, that legislatures, state and national, are shorn of the powers that belong to them. What has happened is this. Experience has shown, as judicial experience has always shown, the unwisdom of hard and fast enactment. The eighteenth century political and legal charts have been found unsuitable. We have found that after all a bill of rights was wisely omitted from the original draft of the federal constitution. Such provisions were not needed in their own day, they are not desired in our day. It is true they have been aggravated to some extent by taking them to be declaratory and then reasoning from assumed first principles instead of applying the provisions themselves. But that practice has been disappearing

with the wane of the idea of the finality of the common law, and the current reports show that with a few conspicuous exceptions, both federal and state tribunals are definitely rejecting it. Consequently it is a misfortune that at the very time when spurious interpretation is thus losing its only foothold in judicial interpretation of constitutions, there should be a strong public demand for elimination or mitigation of undoubted restrictions by a process of spurious interpretation.

The fiction involved in calling the judicial process of finding the law by the name of interpretation leads to just such mischiefs. It gives rise to an aversion to straightforward change of any important legal doctrine. The cry is *interpret it*. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common-law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it."[19] Thus an unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

With respect to legislation proper, however, there is much yet to be done in the development of a better system of interpretation and application. Vandereycken finds three stages in the development of judicial interpretation.[20] (1) The literal stage, is one in which the exact words taken literally are made the sole measure. (2) In the logical stage the law is taken to be constituted by the will of the lawgiver and respect for this will

[19] "Fragment on Government," xvii.
[20] "L'Interprétation juridique," §§ 236 ff.

takes the place of the respect for the formula which governed the preceding period. Most of our common-law interpretation belongs to this stage. We conceive of genuine interpretation as an attempt by logical methods to ascertain the will of the author of the law. (3) In the positive stage, the law is regarded not so much as something proceeding from the will of the lawgiver as something proceeding from society through him; as being the product of economic and social forces working through him and finding expression in his words. Hence the text and the context is no longer held to be an all-sufficient guide. Nor are the circumstances attending enactment held conclusive. Above all things, it is held, regard must be had to the exigencies of social life, to the social ends to be served, to the effect of the different possible interpretations or applications upon the community to be governed thereby. Kohler, one of its pioneer advocates, has applied this method to the new German Code, and his exposition deserves to be quoted. He says:

"Thus far we have overlooked most unfortunately the sociological significance of lawmaking. While we had come to the conviction that it was not the individual who made history but the totality of peoples, in lawmaking we recognized as the efficient agency only the person of the lawmaker. We overlooked completely that the lawmaker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the

lawmaker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the lawmaker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the lawmaker has become."[21]

It is significant that the "Juristentag" in Germany has already undertaken legal-sociological inquiries with respect to the social effect of existing laws as the basis of proposed legislation, and that at least one German professor of law has for some time maintained a seminar devoted to studies of this type.[22]

As has been said, our classical common-law interpretation is of the second type. But something very like sociological interpretation has begun in this country. The briefs submitted by Mr. Brandeis in the case of *Muller* v. *Oregon* and in the case involving the Illinois statute as to hours of labor of women show what may be achieved in this direction.[23] Recent decisions of the courts upon the constitutionality of workmen's compensation laws show that the good sense of our courts is leading them to develop some such method for themselves.[24]

With respect to interpretation, then, I take it our tasks are (1) to rid ourselves here also of absolute theories,

[21] "Lehrbuch des bürgerlichen Rechts," i, § 38.

[22] *Kantorowicz*, "Rechtswissenschaft und Soziologie," 9; *Ehrlich*, "Die Erforschung des lebenden Rechts," Schmoller's Jahrbuch für Gesetzgebung, Gewaltung und Volkswirthschaft, xxxv, 129.

[23] See the briefs in *Muller* v. *Oregon*, 208 U. S. 412; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Ritchie* v. *Wayman*, 244 Ill. 509; *People* v. *Schweinler Press*, 214 N. Y. 395; *Stettler* v. *O'Hara*, 69 Ore. 519.

[24] Opinion of Justices, 209 Mass. 607; *State* v. *Creamer*, 85 Ohio St. 349; *State* v. *Clausen*, 65 Wash. 156; *Borgnis* v. *Falk*, 147 Wis. 327.

and in particular of the remains of the dogma of finality of the common law, (2) to repeal what ought to be repealed directly and straightforwardly and not store up mischief for the future by demanding indirect repeal by spurious interpretation, (3) above all to develop a sociological method of applying rules and thence if need be of developing new ones by the judicial power of finding the law.

A radically different view is finding favor with many laymen to-day and has been advocated by professors of government and political science. One of the latter has suggested recently that the power of interpretation should be taken from the courts and given to some executive body in supposed closer touch with the popular will, thus confining the courts to the task of applying the prescribed and interpreted rule. Perhaps enough has been said to show that interpretation apart from decision is impracticable, that it is futile to attempt to separate the deciding function from the interpreting function. But if the mere function of genuine interpretation were to be set off — and of course *spurious* interpretation is lawmaking and on theoretical grounds is no more proper for an executive commission than for a court, and on practical grounds is obviously better exercised concretely than abstractly — how little should we accomplish! Professor Gray has put the matter very well thus: "A fundamental misconception prevails and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes,

instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present."[25]

Moreover, this very experiment was tried in the code of Frederick the Great and failed utterly as was to be expected. For why should we hope that the executive commission would possess more foresight than the legislature? It is a lesson of all legal history that the most we may achieve in advance is to lay down a premise or a guiding principle and that the details of application must be the product of judicial experiment and judicial experience.

In a much-quoted case of the fourteenth century, counsel reminded the Court of Common Pleas that if it did not follow its own decisions no one could know what was the law. One of the judges interposed the suggestion that it was the will of the justices. "Nay," corrected the chief justice, "law is reason."[26] In this antithesis between will and reason we have the root of the matter. Mere will, as such, has never been able to maintain itself as law. The complaint of our sovereign peoples that their will is disregarded must be put beside the querulous outburst of James I, "Have I not reason as well as my judges?"[27] the attempt of Frederick the Great to put all interpretation of law in the hands of a royal commission, and the futile attempt of Napoleon's code to prevent the

[25] "Nature and Sources of Law," § 370.

[26] *Langbridge's* case, Y.B. 19 Ed. III, 375.

[27] "Prohibitions del Roy," 12 Rep. 63.

growth of a judge-made law. There is no device whereby the sovereign, whether King Rex or King Demos, may put mere will into laws which will suffice for the administration of justice.

To sum up, I think the difficulties involved in the relation of courts to legislation grow out of (1) over-minute lawmaking which imposes too many hard and fast details upon the courts, (2) crude legislation, which leaves it to courts to work out what the legislature purported to do but did not, (3) absolute theories, both of law and of lawmaking, which lead both courts and legislatures to attempt too many universal rules, to attempt to stereotype the ideas of the time as law for all time, and have led courts at times to enforce too strongly the doctrines of the traditional system, at the expense of newer principles, and finally (4), by no means least, insufficient attention to the problem of enforcement of rules after they are made. Enforcement and application are the life of law. But we have spent our whole energies upon making rules and have seemed to rely on faith that they would vindicate themselves. More than anything else, attention to procedure and to the enforcement of rules and their application in practice will relieve the present tension. The Puritan ideal of judicial machines bound down by a multitude of detailed rules has proved inadequate. If legal history may be vouched, the way out lies in strong courts with full powers of doing justice, guided by principles furnished by the lawgiver, but not hampered by an infinity of rules, the full effect whereof in action no one can hope to foresee.

CHAPTER VIII

THE OPERATION OF THE JUDICIAL FUNCTION IN ENGLISH LAW

By Heinrich B. Gerland[1]

§1. RECENT PROPOSALS OF LAW REFORM.—§2. FREE LEGAL DECISION.—§3. ENGLISH COURTS AND LEGAL DEVELOPMENT.—§4. POWER OF ADOPTING RULES OF PROCEDURE.—§5. THE SYSTEM OF FOLLOWING PRECEDENT.—§6. PRACTICAL EFFECT OF THE SYSTEM: ADVANTAGES.—§7. PRACTICAL EFFECTS: DRAWBACKS.—§8. PRACTICAL EFFECTS: FURTHER DRAWBACKS.—§9. UNMANAGEABLE STATE OF ENGLISH LAW.—§10. PROPOSED CODIFICATION.—§11. FREE LEGAL DECISION NOT PRACTISED.

§ 1. *Recent Proposals of Law Reform.* An attempt to consider the various modern movements for legal reform historically, that is, not so much by analyzing their ends and aims as the causes which have brought them about, would seem to be decidedly interesting from several points of view. Such an inquiry even may have more permanent value than a consideration of such movements with a view to the expediency of their aims and purposes. For one thing, we should arrive at a less

[1] [Professor in the University of Jena. This chapter is a translation of an address delivered (in substance) before the Society of Juristic Medicine at Erlangen, and published in "Zivilprozessrechtliche Forschungen" edited by Dr. Richard Schmidt, Heft 6, Rothschild, Berlin, 1910. The translator is *Ernest Bruncken*.]

biased conclusion, we should learn to comprehend and appreciate the historical justification of each movement for reform. Moreover, we should become acquainted with objective facts, while even the cleverest reasoning always retains a more or less pronounced subjective character. Finally, we should learn to know the connections between the changing life of the law and the great movements in the civilization of each period. It is such connections that will often be the first means of explaining the ultimate significance of a legal movement, as well as its ultimate purpose. Nor need I emphasize the further truth that a comprehensive study of this kind will be the only method by which the reforming tendency itself and its substantial contents may be estimated at their true value, or at least appreciated as something of importance.

We may safely assert that among the most interesting movements towards law reform in our own time are those which are directed not against provisions found in particular enactments, such as the Penal Code or the Code of Civil Procedure, but rather those that are the outgrowth of a vague and generalizing discontent with legal conditions and the instruments of administration of the law, the courts. We cannot help taking into account the existence of this movement, which is important also from a political point of view, whatever may be our opinion regarding its justification.

This movement criticizes the functioning of our courts. "Strangers to actual life" is one of the most polite expressions used by these reformers regarding our judges. Attacks are directed, not so much against the contents of our legal system, as against the manner in which justice is administered. It is easy to recognize in this movement two subordinate tendencies. One set of critics starts from the organization of our courts and represents

it as defective. The large number of judges employed, it is said, makes it impossible to have the law administered exclusively by eminent men of real capacity. Disregarding details, we may say that their battle-cry is: Give us men! Give us judges of genius, such as we need! They demand a change in organization to the extent only to which a realization of their real desire requires it. The important thing, to which attention is called again and again, is this: that on account of the manner in which our tribunals are organized a majority of our judges are unfit really to perform the functions which their office and the age demand of them.

Quite different from this tendency (which is represented most strenuously by Adickes[2]) is another current of thought. Those who give it expression also lay stress on the defects in the legal administration of to-day, but believe that the fault lies altogether in the attitude which the judges have assumed toward enacted law. They find the cause of the trouble, not in the manner in which the courts are organized, but in the lack of freedom of the judge in his treatment of legal rules and especially statutes. The judge, they say, is a slave of the statute, an unprogressive idolater of code sections, instead of the shaper of independent legal development. Accordingly, the adherents of this party do not propose to change the principles of the existing organization of the courts. They do, however, propose a new method of interpretation. Ultimately, they are in favor of what has been called "free legal decision," according to which the law as it stands hereafter is to be merely a general guide for the instruction of the judge. His real duty is to find the law which, as has been said, dwells in each particular

[2] *Adickes*, however, has attempted to defend himself against the charge of demanding merely a reform in the constitution of the courts, instead of insisting rather on an amendment of the law of procedure. Comp. "Aschaffenburg's Monatsschrift," vol. iv, p. 13.

state of facts. He is to fill the general forms of the statute with the sociological considerations growing out of each separate, concrete case.[3]

§ 2. *Free Legal Decision.* I have already said that an attempt to give a historical survey of these varying tendencies would be very interesting. Especially with regard to the last of them, it would certainly appear that it is nothing but the manifestation, in the legal field, of a movement common to the whole province of civilization. The struggle of these new doctrines with older ones is another recurrence, in a new form, of processes which have always agitated humanity and will ever continue to do so. For in the last analysis it is a contest between individualism and objectivism as was stated by Oertmann.[4] The adherents of free legal decision are opposed to the absolute dominion of the letter of the written law, which, according to them, is too rigid and formal to adapt itself to the ever-changing needs of actual life — very much as the Law of Nature School in its day opposed to the omnipotence of the absolute governments the inalienable rights of man. It is true that they are anxious, unsuccessfully enough, to conceal the arbitrary character of the method proposed by them under a cover of sociological reasons. Yet it is obvious that all this is but the preaching of a new law of nature which, like the old one, has no ultimate foundation but subjective whim. In one respect alone, the new law of nature is sharply distinguished from the old one: it is of purely

[3] As a matter of course, I do not fail to recognize that in the writings of the reformers both ideas are closely interwoven. I do not mean to say that we have before us two externally separated movements for reform. My object is rather to show that two different chains of ideas may be distinguished in the movement. The distinct nature of these ideas is not changed by the fact that in specific instances they are externally connected.

[4] "Gesetzeszwang und Richterfreiheit," Erlangen University Programme, p. 3.

juridical character, while the old school had primarily a political point of view.

It is hardly necessary to state that in making these assertions, I have in mind merely those representatives of free legal decision who actually demand that the judge shall be independent of the statute. I am not thinking at all of those who are in favor of something quite different and merely propose a new method of interpretation but who wish to retain the principle that the judge must be bound by the statute. The problem now occupying us deals with this proposition: Is it practicable, or to use a much used modern term "right," [5] to accord to the judge the power of disregarding a statute, the meaning of which is unambiguous, if he believes that its provisions are not in accordance with the just requirements of actual life? In other words, is our law to be merely directory, or is it to be mandatory? Another question, with which we do not deal at present, might be: To what extent is the judge to be bound by the legislator? To what extent should the judge be left to supplement the statute? In that connection the next step would be to inquire how the judge should proceed to supplement the statute. That problem, I believe, has been discussed exhaustively and convincingly by Danz in his "Auslegung der Rechtsgeschäfte." [6]

§ 3. *English Courts and Legal Development.* It would be interesting to consider in detail the propositions briefly sketched above and especially to trace the parallelism existing between legal history and the general development of civilization. That, however, cannot be the subject of our present discourse. Instead of it we shall approach these problems from a different angle.

[5] [The allusion is to the term "richtiges Recht" or "law conformable to justice," brought into fashion by *Stammler;* see the translation of his work in vol. viii of this Series.— TRANSL.]

[6] 2d edition.

Both those writers who believe that they have found the true cause for the deterioration of our courts in their faulty organization, and those who are represented by the school of free decision (I may mention especially Ehrlich) have pointed to England as a model and at the same time as proof of their contentions. There, they say, all those things are actually to be found in practical effect, which at home we can merely discuss as theoretical desiderata. Now it seems that the reality of English courts and their organization is something very different from what German reformers imagine, as has been amply proven.[7] Yet it may be desirable also to bring together some historical material which may throw light on the relation of the courts to the law, and especially to examine in some detail the question whether English judges are really in the habit of doing those things which are demanded of our own judges, with increasing vehemence. Such an investigation would seem to be desirable all the more because German writers (again I mention Ehrlich [8]) surprise us by comparing the English judge to the Roman praetor, while at the same time this idea is most strenuously repudiated, among English writers, by men of the greatest scholarly reputation, as for instance Bryce.

Accordingly, I desire to discuss the question of the relation between the English judges on the one hand, and English law, together with its development, on the other. I must limit my subject, however, in a certain direction. I do not intend to enter upon a discussion of the method adopted by English judges for the interpretation of formulated law, although an exhaustive and

[7] Comp. especially my paper on "Die englische Gerichtsverfassung in ihrer gegenwärtigen Entwicklung und die deutsche Gerichtsreform."

[8] "Freie Rechtsfindung und Freie Rechtswissenschaft," a work very interesting in itself, and expressing clearly many of the ideas afterwards discussed by *Adickes*.

strictly systematic treatise of this sort would no doubt help us to realize the differences and similarities of legal interpretation in England and Germany far better than a mere collection of cases selected for that purpose. For the individual peculiarities of each separate case tend to hinder an insight into general principles, or at least make their comprehension disproportionately difficult. As I have said, we shall not discuss herein the interpretation of law by English courts, and may define our subject more narrowly as an attempt to answer the question, *To what extent do English courts take part in the further development of their own law?*

In this regard we must distinguish two things. On the one hand we observe that the courts exercise directly legislative functions to no inconsiderable extent, by themselves making the rules of procedure for the various courts, or at least by taking part in formulating them. On the other hand, we find that the courts play an indirect part in lawmaking by the rule that the effect of their decisions is not limited to the specific case decided, but goes beyond that and becomes a new rule of law. By rendering a final decision in a case, the court does not only act judicially but also legislatively, by creating, as the English phrase has it, a precedent. He becomes a creative producer of law; he establishes a new rule. We need hardly emphasize the point that it is this possibility which has the greatest interest for us. It is this function of the English courts to which the adherents of free decision call our attention. The part played by the English judges in making the rules of procedure has in most cases been mentioned only incidentally by our writers.[9]

§ 4. *Power of Adopting Rules of Procedure.* Let us first speak of the participation of the English judges in

[9] A more detailed treatment only in *Mendelssohn*. "Englisches Richtertum im Court of Criminal Appeal," pp. 41 seq.

the adoption of rules of procedure. Here we should note the following: from a purely technical point of view, no distinction is made in England between statutes regulating the organization of the courts and those providing rules of procedure. The same statute will both establish some particular court and regulate its mode of procedure. However, the statute does not regulate all the details of procedure, but restricts itself to some more or less exhaustive general directions. The details are provided by what is known as the "rules," analogous to what with us are known as "Ausführungs-Bestimmungen" or executory provisions. These are naturally far more voluminous and important than the provisions of the statute. The ordinary rules of the High Court of Justice and the Court of Appeal number no less than 1045 sections, while the Judicature Act of 1873 has altogether but 100 sections. The code of procedure proper is therefore to be found in the "rules."

Within the scope authorized by the statutes these rules have all the force of a statute. Moreover, the legal force of the rules is unlimited, so that even statutory provisions may be modified by them unless that is expressly prohibited, or such provisions are part of the very statute authorizing the adoption of the rules. The fact that rules adopted by the courts may be valid even in derogation of statutes is shown by this, that some statutes expressly prohibit the amending of particular statutory provisions by such rules. This would be meaningless unless it meant that rules can amend statutes.

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The participation of the English judges in the development of the law of procedure would seem to be entitled to a good deal of attention. The question might well be raised whether it would not be practicable to introduce a

similar plan in Germany, avoiding some of the objectionable features. To be sure, the difficulties would be increased by our federal form of constitution. This matter, however, can be merely mentioned and not be further pursued in this place.[10]

§ 5. *The System of Following Precedent.* We now proceed to the second problem with which we are to occupy ourselves. That is the question of the manner in which the English courts are able to influence the legal development of their country by their decisions. This is indeed the most important feature of their law-making functions. As stated in the beginning, the rule is that the decisions of certain courts are binding on other courts. Consequently these decisions, within certain limits, do not merely establish rights between the parties in the case at bar, but are general rules having enduring effects beyond the particular case. Except where they simply reaffirm existing rules, they do actually make new law. These creative decisions taken together form what is known as case-law, which is a distinct species of law standing between statute law on the one side and the common law (meaning the traditional customary law) on the other.

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Now, if we look closer into the question of how a decision may be at the same time an act of legislation, we shall have to start from the principle that existing law cannot be changed by the decision of a court. That is true equally with regard to statutory and to customary law. It follows that decisions merely supplement existing law. It makes new law by filling gaps, but where law already exists, the decision can be declaratory only, never constitutive. As far as this goes, the English judges are

[10] [Several paragraphs of the text and notes, omitted in translation, contain a description of the manner in which the rules may be adopted, and form be given to them. — TRANSL.]

as completely bound by the law as ours. The great principle of the constitution of our courts, according to which the independence of the judge is limited by the law, is in force in England in precisely the same manner as with us. However, the court, in declaring what the law is, must determine how it is to be interpreted, and to that extent the decision is binding. Accordingly, every decision is, within limits to be stated presently, an authoritative interpretation, and being such, ceases to be merely declaratory, and becomes an act of creative lawmaking. Moreover, in interpreting the law, the very important principle is recognized that the courts will not apply a rule to such an extent as to lead to absurd consequences.[11] We cannot doubt for an instant that by such a rule the judge is actually raised above the law. While with us the maxim is unconditionally adhered to that "lex falsa lex est," [12] in England the principle is that the court will rectify the absurd rule, and the maxim would read: "lex falsa non lex est."

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In order to determine to what extent a decision makes law, we must ascertain the relation of the various courts to each other. For the fundamental rule is not by any means that every decision expressing a new rule has lawmaking force to an unlimited extent. It is only the decisions of superior courts that are binding on the courts inferior to them.[13]

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[11] Comp. the detailed treatment of this matter in *Hatschek*, "Englisches Staatsrecht," vol. i, pp. 138 seq.

[12] This rule is the law in spite of all the adherents of free legal decision may say against it. Their arguments refer merely to what they desire the law should be, not what it is. From the most fundamental principle of every State based on law it follows that every activity of the State must be founded on some authority given by law. There can be no appeal from the law itself.

[13] A brief synopsis of the principles regulating this matter will be found in *Hatschek*, "Englisches Staatsrecht," pp. 111 seq.

From this rule, that none but a superior court can bind the inferior one by its decisions, the further important rule is derived that, as a matter of principle, a court is not bound by its own decisions However, while this rule is true of the most important of English courts, the High Court of Justice, it is not true of the Court of Appeal and the House of Lords. In regard to these, the rule is as follows: the Court of Appeal is bound both by its own decisions and by those of courts now abolished which were of equal rank with itself. In other words, the Court of Appeal [sitting in bank] is unable to overrule itself [unless the decision was arrived at by the casting vote of the presiding justice]. The rule is still stricter in the House of Lords, which cannot overrule itself at all, so that a rule once established by it can be changed only by statute.

Amendment of case-law by statute is possible without limitations, of course. It is not possible, however, to change case-law by custom, and it must be distinctly understood that a rule does not lose any part of its binding power by mere lapse of time, no matter how long ago the decision was rendered. As a matter of fact, we may observe that decisions a hundred and more years old may be decisive of a case at the present day, which appears a very strange thing indeed.

§ 6. *Practical Effects of the System: Advantages.* In what has been said we have tried briefly to elucidate the principles governing the doctrine of precedents. Now we must inquire, from a critical and historical point of view, how this system of the participation of the courts in lawmaking has worked out in practice. I believe that on the whole we shall have to give an unfavorable answer: the system as such, it seems to me, will have to be called a failure. A number of reasons for this assertion may be furnished; but before we do

so briefly, let us call attention to what appear to be the positive advantages of the system.

First of all, there can be no question that where the courts assist in law-formation, the authority, or rather the external importance, of the judges is greatly increased. If a decision has an effect beyond the concrete case, it will be of interest to persons not parties to the case, and the importance attaching in strictness to those decisions only which create precedents will be ascribed, in the long run, to all decisions of those whose decisions may create precedents. The rulings of the courts will have greater weight than is the case in countries where their functions are of a merely declaratory nature. It is easily understood that, in the course of time, the respect due to the functions of the judges becomes respect for their persons; although it must be stated that there are other considerations contributing to the high outward consideration in which English judges are held.

The authority of the judge will also be increased, under the conditions set forth above, by the additional fact that he does not suffer from the defects of the law in the same manner as a judge with exclusively declaratory functions. With us, if a judge with strict conscientiousness applies the law as he finds it, recognizing gaps as such and declining to supply deficiencies by his own arbitrary will (as happened for instance in the well-known case of the theft of electrical current), he is apt to be blamed for the faults of the legislator. The supposition that our judges do not know the ways of the world is due to a great extent to the conscientious and correct conception they have of the duty which at the present day is imposed upon them. In England, of course, a similar reproach is not possible.[14] There, gaps in the law have to be filled, and the courts cannot decline

[14] See footnote 7 ante.

the rendering of a decision on the ground that there is no statute covering the case. Their activity in improving the state of the law is likely to make prevalent the notion that if the courts can't find a remedy none is to be found simply because the law prevents it. Consequently the tendency is to put the blame upon the law instead of the judges, and this tendency is favored by the habit of the courts of criticizing, often without mercy, a state of the law which they disapprove.

Finally, it may perhaps be another advantage (although persons of a very scientific turn of mind may incline to call it a disadvantage) that the field for textual controversies is greatly narrowed by the lawmaking character of all decisions, even the interpretative ones. Generally speaking, where a doubt has arisen regarding the interpretation of a rule, that doubt must be considered as solved as soon as a decision has been rendered; it rarely happens in such cases that a textual controversy continues against the ruling of the court.[15] In connection with this we may mention the further fact that the lawmaking character of the decisions seems to tend towards a reduction in the number of appeals on points of law. When a point of law has once been determined, nobody is likely to raise it again, while with us it is always possible for a different ruling to be made, so that the court may be, and actually is, asked to rule on the same question again and again. What is true regarding appeals is presumably true also with regard to new suits; thus there would seem to be little doubt that this lawmaking character of decisions tends to restrain the litigiousness of the public.

§ 7. *Practical Effects: Drawbacks.* Opposed, however, to these advantages of the system, which we may

[15] It will be different where writers may deny that the decision creates a precedent, by calling atttention to earlier decisions.

readily admit, there are grave objections, whereby in practice the whole system impresses one as extremely dangerous. I shall note the following:

First of all, statutory law tends to become secondary to case-law. There is no occasion for the legislature to act when the courts can supply a remedy. Case-law easily becomes the more important and legislation becomes paralyzed because the spur of necessity is lacking. If notwithstanding this fact considerable portions of the law of England have actually been codified, that may be explained by the present current of historical development which involves a gradual abandonment of case-law and likewise of customary law. This is a phase of evolution which unfortunately cannot be more fully discussed in this place.

Further, it is not correct to say that the flexibility of English law is secured by the binding force of decisions. On the contrary, the result is a remarkable rigidity in the growth of law; the process of growth simply cannot go on because a later court is bound by what an earlier one has decided. We must by no means lose sight of the rule already mentioned that lapse of time cannot deprive a precedent of its force. The backwardness of English law, frequently so strongly marked, is attributable to a great extent to the rule of "stare decisis." The proposition that this rule actually causes stagnation of legal development may be shown historically by an interesting example which is frequently not understood among us: the body of equitable rules. Originally, there was in England, aside from statutes, no law but customary law or what is known as the Common Law. In an early period the Lord Chancellor began to grant, in cases where the Common Law afforded no remedy, a kind of protection based on fairness and justice, which was at first a matter of discretion but later was conceded as a matter of right.

In this way arose the courts of equity, and from their decisions a complete system known as equity developed, which was distinct from and not infrequently directly opposed to the Common Law. Without entering on the question of the relations of Equity and the Common Law, which is now purely historical anyhow, we may content ourselves with stating that Equity, which in its beginnings was pure case-law, had by the beginning or middle of the nineteenth century become so ossified and rigid that it was practically impossible any longer to get justice in the courts on merely equitable claims.[16] Here was a test of the practicability of the system, and the assertion will scarcely be contradicted, that the system failed. Incidentally I may remark that to-day there is no longer a separate body of equity law, and what is more important, there is no possibility of one arising again. For the great reform of the courts, in 1873, abolished the distinction between Common Law and Equity, a fact which obviously we cannot treat here in detail.

After this historical digression let us return to our proper subject. A danger of the system of precedents is also apparent in this, that not only the law which judges of genius have found, but equally the products of stupidity and misconceptions (such as after all, lawyers, even English lawyers, are sometimes capable of) lives forever and remains a binding rule. This fault has been well recognized in England, and we often find in the books a warning that a poor judge can do more harm than many an able one can do good.

§ 8. *Practical Effects Continued: Further Drawbacks.* Now it may be supposed that his task of making law will inspire the judge with greater courage, strengthen

[16] Comp., i.a., the account given by *Birrell*, "Century of Law Reform," pp. 177–202. Birrell concludes with these words: "Judge-made law has played its part. To statute law belongs the future. Let us pray for well-drawn statutes."

confidence in himself, spur him on to greater efforts. However, the fact does not altogether support such a supposition. Of course, I do not mean to sit in moral judgment on the members of English courts; I wish to speak merely of the possibilities of the system. Well-reasoned policy, it seems, should always reckon with possibilities, never with probabilities. Now it would seem pretty certain that, generally speaking, the court, and particularly a very hard-worked English court, will be inclined to hunt for a precedent that will fairly fit the case. Is not the very essence of the system of following precedent to be found in the tendency towards relieving the Court from the necessity of using his own judgment, of the act of creation, as Oertmann has appropriately called it? Do we not even now complain of a tendency that turns our judges into unthinking parrots of other people's opinions? Do not forget that in England there is not merely a tendency to follow precedent, but that adherence to precedent is compulsory.[17]

Furthermore, even where precedent does not form an obstacle to development but carries on the growth of the law, there are still great drawbacks to the system. Growth under such conditions will ever be utterly without regularity, a piecemeal development without great, comprehensive ideas. There will be stop-gap decisions, tiding over from one case to the next, and serving the moment, but yet having effects on all future time, and full of inconsistencies. There can be no such thing as the harmonious and permanent solution of great problems. The disconnected, unmethodical condition of English law, with its numerous inconsistencies, that are attractive to none but historians and romanticists, is caused to a great extent by the system of following precedent.

[17] The chase of the precedent is well described in *Hatschek*, "Englisches Staatsrecht," vol. i, pp. 102 seq.

§ 9. *Unmanageable State of English Law.* This leads us to another and undeniable defect, namely the unmanageableness of English law, necessarily caused by the use of precedents. Who can possibly digest and know the enormous collections of decisions? Hundreds of sets of reports are extant, a full collection of them fills a large library. Thereby legal science becomes a sort of esoteric doctrine, comprehensible to none but lawyers. This fact explains the extraordinary influence of the advocates and their power over the courts. For the judges, also, cannot ever hope to command a knowledge of the entire body of precedents. This also explains the commanding authority exercised by certain writers who have attempted to digest this "case-law." The Court cannot possibly know the law — it must be provided for him, and not until that has been done can he render his decision.[18]

In the last analysis it is also owing to this unmanageable character of English law that English lawyers of the present day are trained so unsystematically. They are wont to see in each case merely that case, forming a precedent; they do not learn how to find an abstract principle in the concrete facts, they do not see in the particular case the general rule manifesting itself in individual form. Yet I would not be charged with laying too much stress on abstract systems. Systematic abstraction is the logic of legal science. Nobody can really master particular details who has not first comprehended the multifariousness of the subject-matter in the singleness of all-embracing ideas and concepts, in other words, in systematic unity. The accidental is with difficulty grasped by the memory, the logically

[18] In the local courts of England, where the judge ordinarily is a layman, conditions produce an extraordinary and preponderating influence of the subordinate officers. I mention this point but incidentally because it is typical of English conditions.

necessary is constantly evolved anew by the intellect as a self-evident consequence of the principle.[19]

This lack of system in the training as well as the practical work of the lawyers cannot but exert in turn a pernicious influence on a body of law built upon precedents. How can a judge with an unsystematic mind create a consistent body of law? Thanks to the manner of his education, he will hardly ever be able to do so. While case-law brings about lack of system it also in turn is itself rendered unsystematic.

§ 10. *Proposed Codification.* It would seem as if nobody could seriously deny that the conditions here described in outline must have considerable and unfavorable effects upon the administration and development of the law. In addition, the omnipotence of the courts cannot but lead to subjectively arbitrary judgments. In the last analysis, it is the Court which decides whether a decision is a precedent or not, and whenever he comes to render a new decision, his individual discretion creates a new objective rule. As a matter of fact the condition of the case-law is like an incubus on the people. On the one hand there is a sort of ossification of the actual rules of the law, which the courts all too frequently try to

[19] To be sure, there exists among us to-day a tendency, and unfortunately it amounts almost to a fashion, that is pleased to depreciate the work produced in our legal literature, of which we Germans might rightfully be proud, and to stigmatize it as wholly unimportant. Writers who are given altogether too much honor by calling them prophetic and excusing their extravagances, dare to decry works like *Windscheid's* "Pandekten" or *Sohm's* "Institutionen" as being compositions without value. These writers rave about English judges who, according to them, are trained for practical life by studying the cases and therefore qualified to develop the law further by their own fertile powers of mind. I wish that these enthusiasts had to study German law from the chaos of cases swept together in what, among Englishmen, passes for systematic works. Precisely this is the extraordinary advantage we owe to our systematic jurisprudence: the general propositions hidden behind the occurrences of practical life have been reduced to the abstractions of the law, so that we are relieved from the necessity of abstracting them from the thousandfold shapes and relations of social life.

counteract by artificial interpretation of the facts. On the other hand, it is difficult to get a clear idea of what the law really is, and where there is a lack of precedents there is the greatest uncertainty. Commercial causes suffer most from these conditions. The increasing tendency of business men to stay out of the courts and resort to arbitration is caused to no small extent, it seems to me, by the system of following precedents. Business requires clearness of legal rules. The movement in favor of codification which lately has become more and more urgent in England, comes very largely from commercial circles. Whether anything will come of this within measurable time seems to me more than doubtful. For the unsystematic training of English lawyers renders codification on a really large and systematic scale exceedingly difficult if not impossible. How can mere case lawyers create an abstract code? And even if a legislator of great genius should arise and accomplish so enormous a task by consolidating the common law and the myriads of decisions, is it likely that the case lawyers would know how to make use of the code? The ultimate reason for the opposition to codification, which is so commonly found among English lawyers, has its principal roots, as it seems to me, in the last-named circumstance.[20] Nor should one overlook this consideration: as long as the system of precedents remains in force, even the best codification would be useless. For around the code would grow a new tangle of precedents and cover it like the wild roses that covered the castle of the sleeping

[20] The connection of these two circumstances has been clearly recognized in England likewise. Thus, in "Journal of the Society of Comparative Legislation," n. s., vol. iii, p. 142, the lack of a comprehensive codification is ascribed "to the defective and haphazard system of English legal education, under which the student is usually left to pick up odd fragments of knowledge in court or in barrister's chambers, and is rarely encouraged to take any general or scientific view of the principles which he has to apply."

beauty in the fairy tale. Behind that almost impenetrable hedge the spirit of the law would slumber as in a magic sleep, and it would be doubtful whether any liberator would ever bring it to life again.

§ 11. *Free Legal Decision Not Practised.* We have now observed the place of the courts in the development of English law. We have described and criticized especially the manner in which, by rendering their decisions, they at the same time create new law. Leaving on one side their coöperation in regulating procedure, which, as mentioned above, is well worthy of attention in itself, but of slight interest for a comprehension of the struggles, problems, and development of our time, we have shown, as it seems to me, in contemplating case-law, two important points. First, we are now able to determine whether an English judge occupies a place analogous to that of a Roman praetor, or whether Bryce is not right when he calls attention to the profound difference between the functions of the two officers.[21] Furthermore, the ideal of the school of free legal decision, the independent position of the judge in relation to the statute, is by no means realized in England any more than elsewhere. In England likewise, the court is bound by existing rules; such rules have not simply relative, but absolute force. Still, the courts do exercise restricted lawmaking functions; but these functions are accompanied by so many dubious and not at all dubious circumstances that it seems to me impossible to argue that this system should be desired for our own country, let alone to demand the absolute independence of the courts from the fetters of legal rules, which would in practice be nothing better than absolute judicial arbitrariness.[22]

[21] "Journal of Society of Comparative Legislation," n. s. vol. iii, p. 468.

[22] Adherents of the free decision doctrine might object that they do not ask that decisions should become binding rules. However, we are

Our judiciary will have to rest content. We shall not endow it with the "imperium" of the English courts, apparently splendid as it is, though that splendor may often be external only. Do we thereby deprive our judiciary of all opportunity to contribute its share to the development of our law? Hardly! On the contrary, we thereby create for it an opportunity for intrinsic and not merely nominal coöperation. For legal development proceeds not by the conclusive formulation of a rule but by the working out of principles which underlie the rule. The fundamental weakness of the English system is found precisely in this, that every legal proposition, once authoritatively enunciated, becomes a legal rule. Consequently it is no longer capable of further transformation, of further elaboration. Whenever, with us, a new proposition is announced in some decision, it is possible to work over it theoretically and practically, by criticism and by systematic thought, so as to develop it further and elaborate it more fully. Nothing is concluded, there are unlimited possibilities of further action. By setting the courts free from the fetters of precedent, we furnish them the opportunity of taking part at all times in the scientific work of development. We are not satisfied with the way

not interested just now in dealing with the ideas of the school of free legal decision, but simply in understanding the conditions prevailing in England with a view to discovering whether we can find in them an idea that can be made fruitful for ourselves. And such does not seem to me to be the case. If the German judges are slaves of code sections, the English courts are slaves of precedents. If we are to find vital ideas in foreign countries, it seems to me that we should and could make use first of all of the Swiss *Civil Code*. For in its section 2 we may discover a road towards new goals without risk of falling into a quagmire. However, we had better bear in mind, also, what *Radbruch* says on page 69 of his "Einführung in die Rechtswissenschaft": "With us also, the recognition of judicial lawmaking would of necessity lead to recognizing as legitimate that idolatry of precedent which is just as widely indulged in as it is universally condemned." In other words, Radbruch correctly, as it seems to me, calls the system of precedents a necessary consequence of every form of free decision, and by no means an accidental feature peculiar to English law.

a thing looks to a single court. We find new horizons with new means of knowledge through the free play of many minds all of which we utilize, and through the struggle of opinions which eliminates the factor of subjective error. Thus they have always contributed their share, the great judges which this country also has produced, and of whom we have every reason to be proud. The development of our law is, in part, their work, although it is only their deeds that survive in their decisions, instead of their names also, as in England.[23] Thus I would wish that the body of our judicial decisions may continue to develop and flourish in scientific freedom, subject to naught but the law. Then our judges will ever fulfill the highest desire of all lawyers: they will be men who carry on the legal (which is the social) development of our nation, men who are creators and not mere teachers or slavish repeaters of what they have been taught, pioneers of the future notwithstanding their systematic comprehension of the past.

[23] In England, the name of the judge is frequently cited, rather than the decision, because his name lends authority to the views expressed in his opinion.

CHAPTER IX

CODIFIED LAW AND CASE-LAW: THEIR PART IN SHAPING THE POLICIES OF JUSTICE

By Édouard Lambert [1]

§ 1. THEORY THAT LAW IS MADE STATIONARY BY CODIFICATION: ITS EFFECT. — § 2. EFFECT OF THE JUDICIAL DECISION THE SAME IN THE ANGLO-AMERICAN SYSTEM. — § 3. FALLACY THAT CUSTOMARY LAW IS WITHOUT CONSCIOUS POLICY. — § 4. ORIGIN OF THE FALLACY. — § 5. CUSTOMARY LAW IN THE ANGLO-AMERICAN SYSTEM. — § 6. CUSTOM AND JUDICIAL DECISIONS IN ANGLO-AMERICAN LAW. — § 7. THE TRUE FUNCTION OF THE JUDGE. — § 8. THE ENGLISH DOCTRINE IS A FICTION. — § 9. FALLACY OF THE ENGLISH DOCTRINE. — § 10. COURTS AND LEGISLATURE AS ORGANS OF LEGAL PRODUCTION. — § 11. CONCLUSION.

§ 1. *Theory that Law is Made Stationary by Codification: Its Effect.* Reaction and revolt are manifest against the sterile and discouraging methods of the 1800s which have paralyzed juristic thought in France.

The development of these disastrous methods dates from the codification of 1804. It was, in a way, the price

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that had to be paid for the unquestionable benefits of codification. No sooner had the Civil Code been promulgated, than observation of the incessant action of juridical evolution was laid aside for the easier study of legislative texts. Scientific study gave way to mere commentary. Interpretation was deluded into the belief that the Civil Code and the few laws which have completed it and modified it, would serve indefinitely to answer all the juridical problems which the practice of affairs gives rise to each day. Expounders of the statutes believed that from their provisions, exclusively, by processes of analogy and by induction and deduction, they must control the development in detail, even of principles whose advent the legislator could not have foreseen. They were not concerned whether such control was equitable and adequate to the purposes of the principle, or such, indeed, as would assure its proper operation. Despite the clear and repeated lessons of history, they would not admit the inability of the legislator to render the law stationary; they denied that codification could at best modify the conditions of future juridical evolution, and that it cannot halt or suspend its course. They raised to the level of a dogma the concept of the rigidity and immobility of the law and of its capacity to anticipate and control everything. They considered all other sources of law as dead, and, in spite of the daily contradictions of experience, proclaimed that henceforward the adjustment of the existing system of law to the transformations in social and economic environment could be realized only when and as the legislator decreed. Powerless to prevent the inevitable, spontaneous and extra-legislative production of law, they yet bound themselves to ignore it. They adopted as the fundamental basis of their method a premise which is the very negation of one of the most

universal laws of social evolution, the perpetual mobility of law.

We cannot wonder that, setting out from such a principle, the method introduced just after the Civil Code was adopted did not produce satisfactory results. Its principal effect has been to create a chasm, that widens each day, between the theory of text-writers and the rules created by judicial decisions. Theory was bound to feel the effect of its own policy of obstructing the natural path of the law, and of refusing to allow its principles and reasoning to be made elastic, or its classification of juridical elements to grow and multiply, as the increasing complexity of social and economic relationships required. By declaring the law to be stationary, theory condemned it to part company gradually with reality. Its place had to be taken little by little in practice by a new system of law formed slowly through the repetition of judicial precedent, and adjusted to the actual needs of society: the body of judicial decisions.

Meanwhile the gap between theory and practice is now rapidly widening. The law expounded in classroom and textbook differs more and more from that applied in the courts. If the method obtaining to-day continues to exercise its influence, we shall certainly witness in France a repetition of a most unfortunate phenomenon which similar causes have made observable in different countries and periods, especially at Rome and in England. The same obstinate disregard of the fundamental law of social evolution, the same belief in the absurd doctrine of the inflexibility of the law, which caused the Roman law to split up into civil and praetorian law, and English custom into common law and equity, must end, unless our Civil Code lawyers alter their ways in time, in a similar separation of the

civil law into two systems, differing in origin and spirit, and providing opposing rules for most of our legal problems. On the one hand we shall have a body of "taught law" ("doctrine"), a system fallen into disuse, having a merely conventional and fictitious existence; and on the other hand the rules as applied in the courts, the system which is really in use. The principal consequence of the method which took root in France immediately after codification, has been to screen more and more from public observation the true operation of existing, living institutions, by concealing them behind the masks of dead institutions of the past. This method, too, forced French juristic writers to renounce for the time their traditional sociological functions.

The method which thus paralyzed legal speculation in France during the 1800s, or methods akin, developed spontaneously in other countries under the influence of the same causes. Writers on the Austrian Civil Code [2] allowed themselves to be drawn little by little, as happened in France, into exaggerating the effects of codification, attributing to it a capacity to render the law stationary, and laying aside the observation of the changes in the life of the law to interpret the Code of 1811.[3]

In Germany, the scientific study of civil law enjoyed far more liberty of movement before 1896 than thereafter. By reason of the absence of uniform legislation,

[2] Obviously I include in this category only civil jurists of the provinces of the Austrian Empire governed by the "Allgemeines Bürgerliches Gesetzbuch" of 1811.

[3] Upon the evolution of the methods of study of civil law in Austria, during the first half of the 1800s, cf. the article by *J. Unger*, "Ueber den Entwickelungsgang der österreichischen civiljurisprudenz seit der Einführung des allgemeinen bürgerlichen Gesetzbuches," republished in his "System des österreichischen allgemeinen Privatrechts" (4th ed.), vol. i, pp. 635–638. For the contemporary movement, especially from the point of view of German law, cf. *Julius Ofner*, "Rechtstheoristische Bemerkungen," in Zeitschrift für das privat- und öffentliche Recht (1899), vol. xxvi, pp. 1–18.

it found a ground for development comparable to that offered by France between the time of the official compilation of the customs and the period of the drafting of the Civil Code, though perhaps a little less favorable. . . . The formation of a body of national law in Germany was due largely to the instrumentality of the doctrine of a "Deutsches Privatrecht," or German common law. This exercised a force tending to nationalize the law in Germany, similar to that exerted in France from the beginning of the 1500s by the theory of a common customary law, or, more especially, in the 1600s and 1700s by the numerous legal works which aimed to show the points of resemblance between the judge-made rules of the provinces of customary law and of written law, in order to distill out, wherever possible, elements of a law common to the whole of France. . . .

The continuing influence of the doctrine of a "Deutsches Privatrecht," or German common law, prepared the way for, and made possible, the codification of 1896, which not only realized the uniformity of German civil legislation (though incompletely), but also marked a decisive stage in the movement towards the nationalization of her law. The German Civil Code did for the regions of the "gemeines Recht" what the local and autonomous codifications of the law of the constituent States had accomplished for the other parts of Germany; it destroyed the authority of the Roman law as a subsidiary law, that is, as a direct and formal source of law. In addition, the juridical system established by the new Code was purged of several maxims of Roman importation, met with in the majority of legal systems previously in force in Germany. . . . It is definitely accepted in Germany that the "Pandektenrecht," or modern adaptation of the law of the "Pandects," regarded either as a branch of legal literature

or of teaching, has to-day reached the end of its career; codification numbered its days. The codification of 1896 will therefore have rendered the science of German civil law a double service: it will have hastened the elimination of those elements of a prior system which, being of foreign origin, had not been sufficiently assimilated; and it will within a short time have caused the disappearance of a method of legal education, really a Roman law education, which was developing to an exaggerated degree those natural defects of the juristic mind: I mean a love of logic and abstract conceptions, a scorn of the accidental realities of life, and an indifference to the needs of social and economic life.

But of these benefits the second can scarcely be felt until some day in the future, when German legal science will have escaped from the unfortunate course (though foreseen, to be sure),[4] to which codification constrained it. Codification immediately stimulated in Germany the spread of that narrow and sterile method which during the 1800s had paralyzed the work of our own "school of expounders of the Civil Code." The already abundant literature upon the German Civil Code[5] presents a striking similarity to those first products inspired by the French Civil Code. There is the same marked tendency to remain within the letter of the legal text, to isolate the present juridical system from its historical antecedents, to cut the roots which attach it to the social environment in which it was formed. It

[4] *Zitelmann*, "Die Gefahren des BGB für die Rechtswissenschaft" (Bonn, 1896), and the critical analyses in *Meyer*, "Ueber Codification, Rechtswissenschaft und Rechtsstudium der Zukunft," in Zeitschrift für verg. Rw., vol. vii, pp. 81–101.

[5] Cf. the enumeration of the authors inspired by the new Code and those prior to 1898, in *Maas*, "Bibliographie des bürgerlichen Rechts" (Berlin, 1899), and supplement of 1900, containing mention of works published in 1899. Also *Mühlbrecht*, "Bibliographie des BGB" (Berlin, part i, 1898; part ii, 1900).

is already very evident that German writers, as they warm to their new task of interpreting and applying the Code (too often theoretic and obscure), will abandon for the time the creative labor of improving the law, and will pass through a phase of sterility similar to that which affected French doctrine under the leadership of the "school of expounders of the Civil Code."

§ 2. *Effect of the Judicial Precedent the Same in the Anglo-American System.* This method, which isolates law from the social environment in which it was cradled, which treats it as something inert and dead, appeared in most European countries as a consequence of codification. It was the fruit of a mistaken hope in the absolute stability of juridical relations, — a hope that arose with the New Régime. It is not, however, a consequence peculiar to codification. The very same phenomenon has appeared yet more markedly, and over a much longer period than in France, in countries living principally under a system of customary law, particularly under English law (and also under the systems related to, or derived from, the English law).

In England, this was due to the belief that laws — statutes — were capable of controlling the future for an indefinite time; and above all to the superstitious respect for the decided case. The rôle which on the Continent is assigned to judge-made law — that is, to judicial usage arising out of the repetition of precedent and the uniformity of decisions, — has from time immemorial been assigned by English jurists to the single isolated judicial decision, the case. They have attached to the decision of the judge, on the question of law submitted to him by the parties, an authority higher than that which we recognize in a settled line of decisions, — comparable, indeed, to that won by the "responsa prudentum" at Rome. The English have

conferred upon the judgment of a court (under certain conditions which we need not examine now) the effect not only of proving the custom, but of establishing it forever. The decision of the English judge preserves its value indefinitely. It survives the circumstances which justified it, and the needs which called it into existence.[6] Consequently the most recent English writers continue to expound statutes and cite as authorities cases dating several centuries back, at times to the obscure Middle Ages. The belief that the law is stationary has led English jurists to continue to proclaim the survival of the authority of a body of doctrine, the common law, which grew up during feudal society, and was adapted therefore to the peculiar needs of a society profoundly different from our present civilization.

The consequence was that, with changes in social and economic environment, a marked contrast grew up rapidly between official law and actual usage. This conflict made it necessary for the member of the Government presiding over the administration of justice, the Chancellor, to interfere to temper the hardships of the strict common law, just as the Roman praetor used to do. Later the necessity of officially controlling his interference caused the development, parallel to the ancient courts which decided cases according to the common law, of courts of equity under the inspiration of more liberal ideas. From the 1500s to the 1700s

[6] The scope of the authority attributed to the judge's decision has been defined with remarkable clearness by *Blackstone*, in his "Commentaries on the Laws of England." The idea which he there so clearly formulated remains to-day the most faithful expression of current opinion. *Stephen*, in his "New Commentaries on the Laws of England" (to whose 10th ed. 1886, I shall have constant occasion to refer) reproduces (vol. i, pp. 53 seq.) almost literally Blackstone's arguments, (Introduction, sec. iii, 1), being content, generally, to repeat the text, rewriting simply the antiquated passages. The function of precedent in American common law was described in almost the same terms by *James Kent*, "Commentaries on American Law" (14th ed. by John Gould, Boston, 1896), vol. i, part iii, Lecture XXI, pp. 473 seq.

these courts built up a system of case-law much broader and more modern than the common law upon all the matters brought to them for adjudication. It was known as equity. But its rejuvenescence has in turn been obstructed by the same superstitious reverence for the decided case. For this reason many of its characteristic principles are already singularly antiquated. Thus occurred that division of English law into two branches, so profoundly different in spirit and in origin, common law and equity. The schism represents a fictitious continuance of antiquated and of modern institutions, a confusion between the true field of the legal historian and that of the expounder of living law. We may scarcely find its duplicate unless we go back to the Roman law, which by its blind infatuation for tradition presents a close parity with English custom; or to those juridical systems, such as the Mohammedan or the Judaic law, which developed through the expounding of sacred texts whose religious origin prevented anything but an indirect and concealed evolution.

The reverence for a judicial decision, the coexistence of the common law and equity, the insufficiency of the rules of equity themselves to satisfy all the needs of life, are among the principal causes making English case-law an inpenetrable enigma to the layman, which even the initiated solves with difficulty. These causes have largely contributed to making an actual knowledge of the operation and spirit of English civil institutions very difficult to Continental jurists. Contemporary textbooks on English law are an unsatisfactory guide. With rare exceptions they contain merely analyses of statutes and cases, differing little from the French digests, unless it be in their lack of concern for the reasons behind the decisions cited or for the relation of these to one another. . . .

§ 3. *Fallacy that Customary Law is without Conscious Policy.* What is the cause of these similar results thus outlined? The common cause is found in two deep-rooted but fallacious beliefs.

The beliefs, first, that the productive power of custom is extinguished through codification; second, that there is no conscious element or deliberate act of the will in the creation of customary or extra-legislative law — these two fallacies have led up necessarily to the conclusion that *legislation alone* (as contrasted with the settled doctrines of the courts and of legal writers) *contains an element of policy*, and that the results, therefore, of the study of "legislative policy" can be utilized only by the lawmaker. The very term "legislative policy" translates the widespread conviction that its applications are limited to the field of legislation.

But these two premises, which are the basis of that conclusion, are both fallacious. I have already expressed my views upon the first of them, that is, the immobility of law merely as a result of codification, and have noted a few of the more striking refutations which the theory has received at the hands of actual facts. I therefore merely refer the reader to these prior explanations.

But I have not yet critically examined the second of these premises, viz., the *absolute spontaneity which is claimed to characterize customary law, as contrasted with legislation*, — that is, unwritten law as opposed to written law. The terms "spontaneous" or "natural" movement of law designate conveniently the extra-legislative or customary production of juridical rules, but do not connote the distinctions and reservations which attach to the idea contained in these expressions. We must now critically examine the validity of this current notion concerning the nature of the extra-legislative sources of law. For the field of application

of "legal policy" will be extraordinarily broadened, if it comes to be generally recognized that to predicate complete unconsciousness in extra-legislative production is a mere assumption without foundation in reason. It is due to a spread through European thought of a wholly artificial conception of custom, — a notion foreign to countries which live under a system of customary law, or where the conception has gained but slight foothold through foreign importations that have never been assimilated. This notion has thrived in surroundings subject to the domination of statutory law and deeply hostile to custom.

§ 4. *Origin of the Fallacy.* The essential elements of this artificial notion regarding customary law came from two sources. In part they were furnished by the canon law.[7] The Church's system, at the moment when its principal lines of development had ceased, was dominated by a desire to establish firmly the principle of authority and to assure uniformity of constitution and discipline within the Church. Canon law was little apt to look with favor upon custom, which is the natural stronghold of particularism; and yet it tolerated custom as an inevitable phenomenon, merely endeavoring to limit its production as much as possible.[8] In part also this artificial notion was derived from the compilations of Justinian, which were written during a period

[7] The compilations forming the Corpus Juris Canonici contain references of considerable length to the general theory of the source of law and the function of custom. The provisions relating to custom are gathered together in Gratian's Decree, Distinctions 1 to 15, part i (especially 8, 11, 12); in the other parts of the Corpus Juris we find them more or less scattered (though a few parts contain Titles: "De consuetudine"). Cf. the enumeration and analysis of these provisions in *Brie*, "Die Lehre vom Gewohnheitsrecht," vol. i, pp. 59–95, §§ 9–12.

[8] Upon the spirit of the canon law, cf. *Gierke*, "Deutsches Privatrecht," vol. i, § 20, ii, p. 160; and "Genossenschaftsrecht," vol. iii, p. 307, note 185; *Puchta*, "Gewohnheitsrecht," i, p. 184; *Brie*, loc. cit., p. 63.

of blind faith in the omnipotence of legislation.[9] These two elements were combined and fused by the post-glossators,[10] canonists, and civilians, who for centuries worked to realize the substitution of the Roman law, more or less modified through interpretation, for local usage and the rules originating through custom. In the spread of the Roman and ecclesiastical conception of custom, which tended to reduce this source of law to very feeble productivity, they saw, and rightly, one of the most effective means of realizing their aim.

The Roman and canonical origins of this conception of custom would justify (were it possible to regard it as correct), the contrast frequently emphasized between legislative law as the product of the will and of reflection, and custom as the work of mere juridical instinct. This conflict represents custom as due exclusively to the spontaneous and unreasoned effort of individuals, combined with the inevitable action of the laws of imitation.[11] According to this doctrine, we may speak (with Gény) of the "unconscious and blind force of custom." And we would have to recognize that the branch of legal science whose function we desire to define (that is, "legal policy") could play no part in directing these

[9] This faith is especially evident in the famous Constitutions prohibiting any private commentary and reserving to the Emperor the function of interpreting the doubts to which his legislation might give rise: Cod. I, 17, 1, 2, "C. de veteri jure enucleando . . . etc." Cf. *Gény*, "Méthode d'interprétation et sources en droit privé positif" (1900), p. 73.

[10] *Brie*, loc. cit., pp. 95–128, contains an interesting analysis of the theories of the glossators on this matter; of the post-glossators, pp. 128–164; and of the canonists, pp. 165–202.

[11] Upon the function of imitation (which tends somewhat to limit the character of the spontaneity of custom) as understood by students of the Pandects, cf. *Tarde*, "Les Transformations du droit" (1893), p. 204, "Les Lois de l'imitation" (2d ed. 1895), pp. 267 seq.; and from the exclusively philosophical point of view, cf. *Gény*, "Méthode d'interprétation et sources en droit privé positif," p. 299; *Brie*, "Puissance unificatrice du droit coutumier," contributed to the Congress of Comparative Law, 1900.

natural and unconscious movements from which custom springs; and that it is powerless, therefore, to produce any effect outside of legislation.[12]

§ 5. *Customary Law in the Anglo-American System.* But is this Roman and canonical conception of custom acceptable? Ancient as is the tradition which established it, we need not hesitate to reject it. There is a very decisive reason for rejecting the Roman and canonical conception of custom, viz., the impossibility of reconciling it with the actual operation of custom, as observed in the principal systems of customary law in the several great countries where it persists, and in those systems which we may study through the data furnished by the history of western civilizations.

Especially enlightening in this respect is the English system of law (and also that of the great majority of the United States of America) where, alongside statutory law (that is, legislation in the strict sense), which is growing in volume, custom still forms the general foundation of the law.[13]

English customary law is divisible into two branches of very unequal productivity: first, general custom, whose authority extends over the whole realm, and which is termed the common law, understood in its broad sense, that is, as including equity rather than as distinct from it; second, special or local custom, which applies only to the inhabitants of a more or less

[12] *Gény*, it is true, escapes this last consequence; and none more than he has contributed to win acceptance of the expression "legal policy" in France. This is because his particular theory of the relations of positive law and natural law ("nature des choses positives") made it possible for him to restore to "legal policy" a large circle of influence outside of legislation, in the field reserved by him to natural law.

[13] England and the United States are universally cited as the typical example of great nations living principally under a system of customary law; cf. especially, *Gény*, "Méthode d'interprétation et sources en droit privé positif," p. 282.

restricted region of English soil,[14] and for which the term "custom" without qualification is generally employed.

It is only the second branch of English customary law, or special or local custom, that has felt at all deeply the impress of the Roman and canonical doctrine. Here are discovered not only its distinguishing features (relegated, it is true, to secondary consideration in the English commentaries, but not absent), that is: observance by those affected,[15] presumption of a universal implied consent,[16] sanction of the sovereign[17]; but also a series of rules (given prominence in the usual English law treatises), which read sometimes like mere reproductions, at other times like a development or even exaggeration of the measures adopted by the glossators to restrain the domination of custom. Thus it is declared that a custom must be: (1) immemorial; (2) continued; (3) peaceable; (4) reasonable. Local custom is, therefore, rigidly governed by rules which reflect, not without enlargement, the principal features of the Roman and canonical conception.

On the other hand, and for the same reason, the reaction of the canonical doctrine has been almost negligible, or at most has worked but superficially upon that branch of English custom which stands alone to-day as alive and productive, i.e. judicial precedents. General custom, which Blackstone very justly called the "first ground and chief cornerstone of the laws of England," is divided into two great branches: common law,

[14] In the definition of special custom I except commercial law — customs of merchants — which is usually classed as such, but which shares in the authority attaching to the common law. *Stephen*, "New Commentaries on the Laws of England" (1886), i, p. 62.

[15] English authors generally do not insist upon this first feature; they merely allude to it in enumerating the conditions necessary for the *legality* of the custom.

[16] *Stephen's* Blackstone, Introd. sec. 3, ii, 3; Blackstone (ed. Chompré), i, p. 121.

[17] Blackstone (ed. Chompré), i, p. 116.

properly speaking, and equity. Neither of these two classes of English customs is susceptible of being bent to the narrow conception which we owe to the imagination of the glossators and canonists.

§ 6. *Custom and Judicial Decisions in Anglo-American Law.* The common law itself is in reality a product of judicial activity. To be convinced of this, we need only to read carefully Blackstone's pages on the common law, which have remained classic and have been reproduced in substance in the most recent editions of Stephen's Commentaries. Yet, as a writer, Blackstone was highly respectful of tradition and little disposed to draw the veil from the artifices by which jurists had long deceived the public as to the true process of the formation of English law. . . . After declaring incidentally that the authority of the rules of the common law rests upon general reception and usage, Blackstone is content to examine a single question, yet one of such importance that all others become negligible, namely, the question of proof. When this has been determined, it is possible to consider the theory of the common law as completely established. Blackstone's solution of the question of proof robs of all verity in practice the theory of the origin of custom, borrowed by him from the Roman law.

"How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt and who are bound by an oath to decide according to the law of the land."[18] We have already noticed [19] the singular authority which, due to the reverence for judicial decision, attaches in

[18] Introduction, sec. 3, i.

[19] Ibid., sec. 3, i, p. 59.

England to the precedents of the courts. "They are the principal and most authoritative evidence that can be given, of the existence of such a custom as shall form a part of the common law."[20] Even this early statement is incomplete and inexact, and is frequently corrected in the pages that follow. Judicial decisions not only form the principal proof, but the sole means of proof of custom.[21] Thus Blackstone comes to define the common law as "general immemorial custom, . . . from time to time declared in decisions of the courts of justice."[22]

Blackstone's expression, "living oracles," immediately suggests an analogy between the function of the oracle of antiquity, in religious matters, and the English judge in legal matters. The latter reveals custom as the former revealed the divine will. Neither admittedly creates or originates; each merely discovers and interprets. The judge to-day declares the custom as the oracle formerly spoke the divine will. Just as (according to pagan belief) the intentions of a god were apprehended before being affirmed by the oracles, so English customs, according to the traditional notion superstitiously preserved by modern jurists, exist prior to the judgments through which they are made known. From their first application they are held to be immemorial as though their origin was lost in the obscurity of time.

There are, one may say, in the history of a customary rule, two clearly distinguishable phases: one prior, the other subsequent to its judicial declaration. So long as the declaration of the custom does not intervene, the rule, though already existing in theory, is unknown, — we might say even unknowable, not only to the

[20] *Blackstone*, "Commentaries," Introduction, sec. 3, i, p. 69.

[21] Ibid., sec. 3, i, p. 71.

[22] Ibid., sec. 3, i, p. 73.

unprofessional mind but even to the jurist. The lawyer knows that the rule exists, but he must give up hope of discovering it through his own investigation. English custom, like the will of the pagan gods, remains hidden from vulgar eyes. Only the elect may perceive it, — the judges, endowed, like the oracle of old, with a special power of receptivity. But when the judge has performed his function, when he has pronounced his oracle and has recognized in such and such a rule the character of custom, behold the transformation! What before was uncertain and indifferent, is now a permanent rule.[23] No one asks by what signs the judge recognized or divined the custom. His function fits him to penetrate its mysteries; on entering upon his duties he has given his oath to unveil them; from that time his judgment becomes the very voice of custom. When a question, already settled by a decision, is again raised before a court, it is enough to cite the prior decision, that is, to show the identity between the former case and the case under litigation, for the custom to be thereby proved and for the judge to be bound by it. Custom does not, therefore, acquire a practical value, that is, become applicable, until it is declared for the first time by the judge. But from that instant it becomes law. Henceforth, on the occasion of a similar hypothesis, the judge will not be asked to declare the custom. It is known. It binds him as well as the parties to the case. He is merely asked to interpose his authority to make it respected, and the precedents must be followed indefinitely.

[23] *Blackstone*, vol. i, Introd., sec. 3, i, p. 69; *Stephen*, vol. i, p. 53, "When in any case the law has been solemnly declared and det rmined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments." Cf. *Pollock*, "Essays in Jurisprudence and Ethics," pp. 246–252.

We have seen, it is true, that Blackstone moderated this principle where the precedent is contrary to divine law, or is manifestly unjust or absurd. The exception in which Blackstone formulated this exception deserves quotation; it throws a final light upon the conception which English jurists hold of the relation between custom and judicial decision: "Yet this rule admits of exception, where the former determination is most evidently contrary to reason; and much more if it be contrary to the divine law. But even in such case the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust it is declared, not that such a sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined."[24] . . . "So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law."[25]

§ 7. *The True Function of the Judge.* Plainly we must ascribe this modified English doctrine to one of those rare traces of reaction from the canon law doctrine. Mention of divine law is proof enough. We rediscover here, between the lines, the classic theory that *irra-*

[24] *Blackstone*, vol. i, Introd., sec. 3, i, pp. 69–70; *Stephen*, vol. i, p. 54.

[25] *Blackstone*, vol. i, Introd., sec. 3, i, p. 71; this passage is not reproduced by *Stephen*. In his chapter upon the science of case-law, *Sir F. Pollock* ("Essays in Jurisprudence and Ethics," chap. ix), does not even mention this theory of irrationality. It has penetrated but very superficially into English thought. He has, indeed, foreseen the possibility of mistakes by the judge and the influence which passion may work upon him, but he has regarded these as mere accidents, capable of leading the observation of the jurist astray in his effort to predict future judicial opinion. But the English doctrine does not admit that these grounds may be pleaded to shake the authority of cases. We might summarize with complete accuracy the observations of Sir F. Pollock by inverting Blackstone's maxim and declaring that the opinion of the judge and custom are synonymous terms.

tionality invalidates custom, — profoundly transformed, however. Blackstone's interpretation of this rule (the very validity of which on the Continent was doubtful) ends by paralyzing it. If Blackstone lingered over the examination of so theoretical a hypothesis, it was because he imagined it a favorable occasion to dissipate the confusion, which arises easily in every mind not trained to juridical subtlety, between custom and the judgment which declares it. Stephen, later, felt the necessity of strengthening Blackstone's attempted demonstration by a few observations of his own. Often, he said, questions arise concerning which the rules of the common law have not been fixed by judicial decisions. The judge will first turn to a process of analogy in order to come indirectly to a solution of these problems by means of cases handed down upon closely related facts. But sometimes even analogy will not serve to guide the judge. Then there falls upon him necessarily the duty to divine and reveal custom. His judgment will be "according to the natural reason of the thing."[26] This part of the common law of England which, being undeclared by the courts, enjoys as yet a merely theoretical existence and remains unknown to the public, presents, therefore, features singularly resembling what M. Gény calls "la nature des choses positives." Even where the judge is in reality reduced to the promptings of his own reason, the principle must be maintained, says Stephen, that the magistrate does not create custom, but merely reveals it. Consequently

[26] *Sir F. Pollock*, "Essays in Jurisprudence," pp. 251, 255, prefers to emphasize another force, which under these circumstances influences the judge. He speaks of an "ideal standard of scientific fitness and harmony," similar, he says, to the "elegantia juris" of the Romans and closely akin to what is termed in France "l'esprit de la loi" or "l'esprit du système juridique." In the absence of precedent these guide the judge and exert their force upon him by reason of his legal training.

his judgment always appears to declare what the custom is and not what it ought to be.[27]

These expositions by Blackstone and Stephen furnish ample justification for our former statement that the system defended by Dahn and Stobbe, and before them by Puchta and Savigny, denying that usage ("Uebung") is a constituent factor in customary law, and reducing it to the rôle of a normal mode of revelation of pre-existing custom, contains a far larger share of truth than the contrary opinion at present dominant among the "Pandektenrecht" school of writers. This system rests upon an accurate comprehension of the ideas current in the localities where custom is still strong; especially has it the merit of being in very close accord with the conception, held by English jurists, of the common law, which is the one type of custom remaining vital and active in England.

§ 8. *The English Doctrine is a Fiction.* But does that conception, which is almost universally accepted in populations exclusively or principally subject to customary law, and especially in England, conform to the reality? Does it faithfully describe the true genesis, the real operation of custom? Certainly it does not. Sir Henry Maine demonstrated this with remarkable clearness in the eloquent pages of his "Ancient Law." He was not led, it is true, to deal with the common law except incidentally, in the course of his examination of legal fictions and of the rôle which they have played in the juridical evolution of many societies. He points to two examples, the one borrowed from Roman law, the other from English law, which, he says, are well calculated to illustrate "the efficiency with which they perform their twofold office of transforming a system

[27] *Stephen*, i. p. 55.

of laws and of concealing the transformation."[28] It is the second of these examples, that of English law, in which we are interested. The traditional conception of the nature and origin of the English common law as presented in the commentaries of Blackstone and Stephen, appears, under the light of Maine's analysis and criticism, as the product of a curious combination of reality and fiction.

The truth is that for many centuries the customary law of England has developed only by the deliberate activity of judges, and that its changes and progress, so slow and so notoriously inadequate, are the exclusive work of judicial legislation. The decisions of the courts, which have been recorded in innumerable volumes of "reports," occupy in the English customary system a place comparable to that of legislative enactments in the French system of codification. It was this consideration which urged Maine, in another part of his book, to protest against a terminology, certainly incorrect, yet definitely accepted in the juridical language of France, which admitted of the expression "unwritten law" to denote "customary law." English common law, says Maine, is certainly a customary law, but it is not an unwritten law. The term written law, if we take it in its first and natural meaning, is as suitable to English customary law as to the parliamentary law of the continent. It is written like the latter, only in reports of decisions and not in codes.[29]

The English and the French judge alike must fulfill a twofold mission, and in accomplishing them each has recourse to methods which are, it is true, far from identical yet between which there exists a certain kinship.

[28] *Sir Henry Sumner Maine*, "Ancient Law" (London, 1906), with an Introduction and Notes by *Sir F. Pollock*, chap. ii, p. 35.

[29] *Sir Henry Sumner Maine*, ibid. pp. 11 and 12.

(*a*) His first duty is to impose respect for existing law. To this end, his main effort is to reach a decision of the question litigated before him, either directly from the text of the law in France, and from judicial precedent in England; or indirectly by analogy and by synthesis and deduction. Only when he succeeds by the first method, can he be said to limit his activity to declaring and applying existing law. (*b*) But legislation in France and judicial decisions in England are inevitably deficient. The court is necessarily called upon to cure little by little the deficiencies of the law, since it is bound to decide any and all juridical questions submitted to it, whether or not law or precedent has answered them by anticipation; whether they have arisen suddenly out of a change of social and economic conditions, or whether they are due to causes already old. In regulating the new legal relationships which the incessant movement of civilization engenders, the court cannot, unless it is to run into the most patent absurdities and iniquities, turn blindly to the mere machinery of interpretation. Consciously or not, the judge in these cases inevitably has recourse to guides and reasons, — external to the texts of legislation in France and to the judicial precedents in England; he must search for a solution which accords not only with the general spirit of the law, but also with that sort of contingent and natural law which varies with time and place, which Stephen calls the "natural reason of the thing," and which M. Gény calls "la nature des choses positives." Even then, although his decisions always appear and must appear, as Stephen says, to be a declaration and a recognition of existing law, it is none the less true, as Maine so well demonstrated, that they essentially form, instantly in England, or through repetition and uniformity in France, additions and even corrections of prior existing law. In England,

as also in France, the court has, therefore, a second function, that of *creating law*, of participating in the indispensable work of juridical evolution and progress.

The fiction which has slipped into the traditional doctrine of the common law has a double purpose: to conceal this second function of the court, and to conceal the source of the materials used by the judge in fulfilling his first function. The fiction lies in attributing the whole production of judge-made law to an obscure and mysterious power, the impersonal and superhuman nature of which gives it a prestige to which judgments could not pretend, so long as they were recognized as the work of officials, mere individuals, known to be subject to prejudice, preconception and every other human weakness. This element of Reason, which clothes itself in the speech of the magistrate and controls it — not unlike the god of antiquity stirring within the spirit of the oracle, speaking as by his own voice, dictating his judgments and cloaking them with his own authority,— is "immemorial custom," sanctified by the supposition of a universal recognition, of a universal acceptance through many generations. Thus its decisions, by the antiquity attributed to them, escape the suspicion and opposition that would be provoked by any avowed legislative innovation of parliament or courts. Whereas the individual opinions of judges are subject to error and variation, this element of Reason is blessed with infallibility and consistency. Though the rules established by judicial decisions are limited, it has anticipated the solution of all legal difficulties, including those which will arise only in a far distant future.

Far be it from us to smile at this fiction, whose childishness Maine so pitilessly uncovered. We find it again in many forms. It is justified and useful in every country where the mass of the population has not reached

a relatively advanced stage of social and juridical education; after that it survives through the tyrannical force of habit. The sarcasm which Maine employed against the jurists of his own country rebounds and strikes at the majority of French jurists, — all those, indeed, who adhere to the "school of expounders of the Civil Code." These concede to the legislator the functions (or rather one of them, the second) which the English conception assigns to immemorial custom. Upon the shoulders of the legislator they lay the responsibility for all the innovations which judicial legislation daily realizes under the imperative pressure of novel economic requirements and under the domination of the ceaseless necessity to do and to live. Too often the judges, themselves the involuntary instruments of the transformations of our legal system, are as unconscious of the throb of the law and the evolution going on about them, as we are of the rotation of the earth.

The study of the juridical theory of the sources of English law is rich in suggestion to the French jurist. In finding there, in an even more striking degree and consequently franker and cruder, and in an unaccustomed form, the fiction upon which the dominant French method still rests, he realizes better than before its improbability and childishness. To the Continental jurist, whose education has not been forced into those twists of mind peculiar to the English practitioner, it is impossible to be blind to the truth that this "immemorial custom," from which it is claimed an answer may be drawn for every new case and which regulates institutions born but yesterday, exists, according to the striking expression of Maine, only "in nubibus" or "in gremio magistratuum."

Was this illusion of to-day ever a reality? Did the common law, which so long has grown and been renewed

through the work of the courts, take its rise in the rules and maxims of custom, as defined by the German school of writers on the Pandects? In the fragment cited from Maine's "Ancient Law" that author does not hesitate to deny this. And his opinion is confirmed by the most learned historians of English legal institutions of the Middle Ages, especially by Pollock and Maitland, whose scholarship can scarcely be contested. After a careful investigation into the origin of the common law, and the reason of its substitution for special custom, that is, for manorial and other regional jurisdictions, these authors conclude that the general custom of England, which later assumes the name of common law, could have been very justly defined in Bracton's time as the "custom of the King's court" or "the judicial precedents of the King's court." They have pictured this custom as developing by processes familiar to every system of judge-made law, that is, through judicial decisions and the use of analogy.[30] Though it would certainly be an anachronism to attribute to the time of Bracton the modern English idea of case-law (i.e. the authority of precedent, even of a single decision), nevertheless in the early period there already existed a "consuetudo curiae," a mass of judicial tradition. This was at first more or less imperfectly made known to the judges by the work of the clerks, but it gathered strength and precision constantly as the personnel of the King's court was drawn more and more from the legal profession.[31] But we are not to believe that even these early rulings of the King's court, which gave rise to the common law,

[30] *Pollock and Maitland*, "History of English Law" (2d ed. 1898, Cambridge) vol. i, bk. i, chap. vii, p. 183 and note 1, quoting *Bracton*, f.1.b., who showed well the functions of analogy and the creative rôle of the courts in the adjudication of new questions, judgment upon which was surrounded with a special solemnity.

[31] Ibid., pp. 173–184, and upon the transformation of the King's court, pp. 152 seq.

faithfully reflected some preëxisting body of actual customs (in the Roman and canonical sense of the word); Pollock and Maitland do not leave us even this remnant of illusion. These authors show how the situation created by the Norman Conquest (that is, the contact of peoples who had up to then lived under different systems of law), forced the King's court to adopt methods of eclecticism and compromise, consequently to *create* law; its judgments were based far more upon reasons of equity than of strict law. On the one hand, this court, made up of persons the majority of whom did not understand English, could not consider itself bound to apply the early Anglo-Saxon law; on the other hand, it was manifestly impossible to derive from the old customs of Normandy a set of rules to cover the situations growing out of the conquest and the establishment of the Normans beyond the Channel. Under the government of the Norman King there was something more than a mere transplanting of Norman legal precedent into England; a new body of judicial law was gradually created by a court whose personnel was imbued with Norman traditions. Pollock and Maitland describe it in these terms: "a flexible, occasional jurisprudence, dealing with an unprecedented state of affairs, meeting new facts by new expedients, wavering as wavered the balance of favor between him (the King) and his barons, capable of receiving impressions from without, influenced by the growth of canon law, influenced perhaps, by Lombard learning, modern in the midst of antique surroundings."[32] The rules which formed the earliest basis of the common law were, therefore, the product of a fusion, partly of elements borrowed from various sources, Anglo-Saxon, Roman, and especially Norman and canonical, and partly of a large mass of material of

[32] Ibid., p. 108.

original creation. This fusion was attained by the continuous labors of the King's court. Thus, to judicial practice the common law owes its origin as well as its gradual progress.

English writers upon the genesis and evolution of the common law reveal, clearly enough, it would seem, the true part played in England both by the Roman and canonical doctrine of custom, and by an analogous doctrine which, in imitation, came to discover in custom, as generating cause and basis, the elements of spontaneous usage and unanimous acceptance by the persons affected, of direct and instinctive perception of the law by the whole body of the people, and of voluntary submission of all its members to the rules thus perceived. This doctrine forms a sort of screen, behind which customary law lives and moves, concealing its activities and deluding the public into a belief in the absolute fixity of a system of law which is all the while the subject of continuous transformation. The intrusion of this screen, hiding from indiscreet eyes the fluctuations and the processes of formation of the law, has never checked nor deterred the development of that species of custom which has preserved its productivity and vigor to our day, that is to say, general custom or common law. And English jurists made no claim to force local custom to conform to the fiction which up to that moment had served only to protect it, until the time when that mode of production of law ceased to meet the needs and aspirations of English society, and then only with the object of realizing within a short period its almost complete elimination.

The example of English law appears to us absolutely conclusive. It is useless to argue as an objection the individualistic spirit of this system of law. Certainly it is not in this characteristic feature of English law, —

reverence for the decided case, faith in the unlimited authority of precedent, even when isolated, — that we must search for the cause of those indissoluble ties between custom and judicial decision which are so clearly revealed by even a superficial observation of the operation of English common law.

§ 9. *Fallacy of the English Doctrine.* The contradiction of ideas contained in the two views of custom under consideration is inherent in the very nature of customary law. In such a system of judicial law, as in a system of parliamentary legislation, the judge is called upon to decide the questions submitted to him, not according to his own subjective opinion, but according to a supposedly preëxisting rule. He is required to declare, not what seems to him just, but what the law is. He is under a duty to apply a custom, and in theory he may judge only by reference to it. But, to apply a custom he must know it, and it is not known until the moment when he applies it. This vicious circle is the inevitable consequence of a conflict between theory and facts, to be found in all conditions where law develops exclusively or principally through other than parliamentary channels, as is the case to-day in Anglo-Saxon societies.

If we search in English legal literature, which is naturally more authoritative than any other in the matter, for a definition of general custom, we shall meet with many differences, according as we consult the ordinary lawyer or the scientific student. The lawyer (or the author of a treatise on the law who grasps only the traditional view, often made up of fiction) tells us that the judges of his country have never had the power to create law, that their decisions conform to an immemorial custom, every element of which is as ancient as the English nation itself, though many of them have

only been recognized and applied for the first time in our day.[33] On the other hand, if we consult those writers who have devoted their energy to that higher branch of legal science known in England as "jurisprudence," we hear a very different story. These writers, accustomed to search behind legal dogma for the sociological reality, tell us that the common law has been largely the work of the judges, and that most of its rules originate in legal precedent.[34]

§ 10. *Courts and Legislature as Organs of Legal Production.* During the long hours which I have devoted to the analysis and criticism of the strange tissue of fictions which we owe to the Greek and Latin rhetors and to the compilers of the Corpus Juris, the canonists, the glossators, and post-glossators, the leaders of the historical school, and the late German school of commentators of the Pandects, I have had constantly before me in memory one of the most impressive passages in Anatole France's "The Well of St. Clare." He is describing the dream of the holy man Giovanni, on the eve of his martyrdom for having confessed the immaculate and candid truth. He sees a great living wheel, made of a multitude of men of all ages and conditions. From their lips issue scrolls bearing devices no two of which are of the same color or sense, but all of which

[33] The doctrine of *Blackstone* and of *Stephen*, cf. supra, pp. 265 seq.; *Hammond*, in "Lieber's Hermeneutics," p. 312.

[34] *Holland*, "The Elements of Jurisprudence" (Oxford University Press, 9th ed. 1900), pp. 61–62; *John F. Dillon*, "The Laws and Jurisprudence of England and America" (Boston, 1894), pp. 173 seq., 229 seq.; *Holmes*, "The Common Law," Lecture I, p. 35; *Pollock*, "First Book of Jurisprudence," pp. 229 seq.; *Markby*, "Elements of Law" (Oxford, 1896), pp. 57–65; *Greer*, "Custom in the Common Law" in Law Quarterly Review, vol. ix, pp. 153 seq.; *Gray*, "Judicial Precedents" in Harvard Law Review, vol. ix, pp. 27 seq.; *Austin*, "Lectures," II, p. 655; *Bentham*, "Works," vol. iv, p. 460; ibid., vol. v, p. 13; cf. also the more guarded observations of *Courtenay Ilbert*, "Common Law and Statutory Law," in Journal of the Society of Comparative Legislation (1899), n. s. vol. iii, pp. 407–416.

end with these words: "Such is Truth." The wheel contained truths of every shade of color; but one was lacking, — the pure, white truth. And as the holy man laments and seeks in vain upon this palette of color for the truth for which he is about to die, the wheel begins to revolve. As its speed increases the colors run into one another; then they blend. When its movement is so rapid that the eye no longer perceives its motion, but gains the impression that it is still, the wheel appears quite white. And so Giovanni learns that the white truth is made up of all the variant truths, just as white is made of all the colors.

There is a striking resemblance between customary law and this wheel described by Anatole France. The truth is that jurists and sociologists must give up hoping to observe customary law in a state of repose. It is never at rest. But its movement, at first timid and halting, is accelerated only through the decisive impulsion of judicial decisions. During its state of preparation, before it has been judicially established, it moves slowly enough for its elements, of infinite variety, to remain distinguishable. It presents then the spectacle of struggle and of a brutal conflict of individual interest. . . . But, as judicial precedent, communicating its own energy to the rudimentary customary law, abruptly accelerates its motion, the multi-colored threads in which the fabric of custom is woven cease to be visible. The whole array of devices in which the participants in the struggle formulate their opposing pretensions, are gradually effaced. Soon are perceived only the words of the final phrase: "Such is Law." It seems as though all that multitude, who in one brief vision filed before us, had the same words upon their lips.

Let us not be captivated by the magic of words. Let us beware of that antithesis, so seductive at first, yet really devoid of sense, which has passed from text to text and has even slipped into the otherwise admirable critique by M. Gény.[35] It contrasts *legislation*, the work of volition and of reflection, the manifestation of the freedom of social will, with *custom*, which it holds to spring from the action of "the hidden and silent forces pressing about us and from all the surrounding conditions in which we move, directing us unconsciously, . . . operating independently of our wills and bending them."[36] Legislation no more than custom escapes from the tyrannical force of sociological laws. The legislator does not labor freely in some Utopia, independent of natural forces; and when he attempts to ignore the circumstances of the period and the place, and to shake off the many ties attaching him to earth, experience quickly undeceives him. Yet on the other hand, the play of the obscure forces of nature is powerless of itself to create true juridical customs; the incessant collaboration of man is needed. Officials having special knowledge, be they the diviners, priests, or pontiffs of antiquity, or the judges of to-day, do not passively preside at the birth of custom. Without their help, custom would never be separated from its husk of mere manners. They select, cultivate, prune, and straighten the spontaneous growth of juridical life. Daily they are called upon to discover and initiate, and to exercise, in the name of the people, the freedom of the social will.

[35] *Gény*, "Méthode d'interprétation et sources en droit privé positif," p. 359.

[36] *Deslandres*, "La crise de la science politique," in Revue du droit public et de la science politique (1901), vol. xvi, pp. 69 seq. The author speaks in these terms of the international phases of judicial legislation, that is to say, of one of the forms of modern custom.

And these two essential methods of the production of law, legislation and custom, were disassociated only at a very late date in legal history. The truth is that, while the same elements enter into the composition of both legislative and customary law, they do not do so in the same measure, and that the relative proportions of these elements in each grow more and more unequal as we approach periods of higher civilization. It is also true to-day (it has been very far from true in the past) that the legislature and courts accomplish a function in common though by recourse to very different processes. The work of the courts is more fragmentary and disconnected, less systematic. It conceals its creation behind a fallacious appearance of establishing or applying preëxisting laws. It acts consequently with much less promptitude and resolution than the legislature. Each moment it comes against immovable obstacles, and to avoid them it is forced out of its course.

The majority of those jurists who expect our legislative laws to solve the fundamental problems of juridical sociology, and who imagine that our parliaments are competent to revise and codify the laws of social evolution, maintain that the task of adjusting the law to the continuous transformations that go on in the economic substructure of institutions falls wholly and solely upon the legislator. If this were true, the function of legal policy would be exceedingly modest. . . . It is a far journey from the ideal to the reality. The ideal is that the tendency of our period towards legislation, combated long ago in vain by Savigny, should make itself felt more rapidly than it has done[37]; that the legislator should aim to check so far as possible the creative action of judge-made law by himself under-

[37] *Durkheim*, "Division du travail social," p. 427; *Duguit*, "L'État, le droit objectif et la loi positive," p. 89.

taking regularly the revisions necessary to adjust the existing system of laws to the continual change taking place in social and economic environment. When the legislator does deign to perform personally this task, his work is more effectual than courts. Officially these are established only to interpret and apply preëxisting law. They interfere to create a rule of law only under the irresistible pressure of sociological laws which contradict and paralyze the accepted formulae; they do this timidly and regretfully. Judicial law is naturally conservative, and trails but slowly after the changes in usage and the mutations in our economic life. By the mere fact that it must, wherever possible, hide its innovations under the cover of interpretation, it arrives generally only by tortuous and indirect ways at a goal which the legislature may gain directly and consequently much more surely. For my part I cannot agree with Josef Kohler in commending the benefit to be derived from the discipline to which judicial practice is put in rendering the institutions of a past age tolerable to-day, and in maintaining that neither Roman nor English law would enjoy its world extension were it not that in their development they had to have recourse very largely to fiction.[38] The forces which propelled the Roman law came from quite other causes. As to English general custom, or common law and equity, its spread is due to the colonizing traits of the English and not to any merits of its own. Indeed, on the contrary, it may be noted that the advance of legal knowledge has been infinitely less rapid in England than the general advance of civilizations, and that this is due, if not wholly, at least in part, to the sluggishness and inadequacy of

[38] "Ueber die Methode der Rechtsvergleichung" in Zeitschrift für das Privat- und öffentliche Recht der Gegenwart (1901), vol. xxviii, p. 278.

legislation in that country. It is very much to be desired, therefore, that in the future the legislator interfere far oftener than hitherto, in order to direct and spur on the too slow evolution of judge-made law.

§ 11. *Conclusion.* The policies of legal rules, then, are not the monopoly of the legislator. He alone, in effecting those policies, employs certain expeditious and perfected methods. But he is not alone in his right to consider legal policy. He has two collaborators, — the pronouncements of the courts and the practice of the profession. These other workers, using different methods, to be sure, pursue alongside of him a common task, — the adaptation of the law to social forms which are in a constant state of renewal. All who live in the atmosphere of the courts, — not only the judges, clerks, attorneys, and barristers, but also the notaries, business men, and drafters of documents, — all these, whether consciously or not, are active sharers in legal policy, The value of legal institutions, in any country, is not dependent solely on the wisdom and activity of the legislator. And in the schools of law, also, legal policy, therefore, should enter logically as a part of the studies. There it becomes that "juridical art," creative and civilizing, in its function, such as it has been conceived in all times by jurists worthy of the name — those who in the heroic periods of legal history were the true artificers of the law. And the phrases "legal policy" and "policy of the law," which have come into use in the last few years, do not denote a new science, but merely a new way of dealing with an old discipline.

And so what we have sought to show is that the extra-legislative movements in law which occupy so important a place in to-day's activities are more than the product of the blind forces of nature; that they operate under the direction or supervision and with the constant

coöperation of the whole body of men of the law; that the task of framing the policies of a nation in its civil law is not performed solely by the legislator, but also by other organs of the law, upon which is exercised an even more effective and constant influence through the writings of jurists, the opinions of the courts, and the practitioners of the profession.

CHAPTER X

METHODS OF JURIDICAL THINKING[1]

BY KARL GEORG WURZEL

INTRODUCTION

§ 1. JURISPRUDENCE AND OTHER SOCIAL SCIENCES.

I. NATURE AND QUALITIES OF JURIDICAL THINKING

§ 2. POPULAR NOTIONS. — § 3. POSTULATES OF JURISPRUDENCE. — § 4. LACK OF BIAS OF THE JUDGE. — § 5. CERTAINTY OF THE LAW.

II. THE PREVALENT THEORY OF INTERPRETATION: CRITICAL EXAMINATION OF ITS PRINCIPAL TENETS

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III. SCOPE OF JURIDICAL THINKING, ESPECIALLY ITS RELATION TO INTERPRETATION

§ 12. ITS LIMITATION IN PRINCIPLE. — § 13. SOME POSITIVE OBSERVATIONS REGARDING THE SCOPE OF JURIDICAL

[1] Translated from the monograph entitled "Das Juristische Denken," Vienna, 1904 (Verlag Moritz Perles), by *Ernest Bruncken*.

THINKING. — § 14. A LOGICAL DIGRESSION. — § 15. APPLICATION OF THE ABOVE PRINCIPLES TO LEGAL CONCEPTS; PROJECTION. — § 16. THE LEGISLATOR.

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VII. Conclusion

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Foreword

This paper is not to be a philosophical work but a juridical one. In order to keep it such, notwithstanding

the abstract character of its subject, I have tried to maintain the connection with the matters of which legal writings usually treat by as many and as concrete examples as possible to illustrate general propositions. I believe that concrete illustrations are often more effective to make a point than a long chain of theoretical deductions. For this reason I have frequently contented myself with simply offering a number of examples to prove some general proposition, trusting that the reader will himself make the theoretical connection between the one and the other. Whether I was right in doing so will depend to a large extent on whether the reader attaches the same degree of importance to actual facts that I do. Right here at the start I think it advisable to lay stress on the purely positivistic character of my work, just because it is intended primarily for lawyers. For no class of men are so much inclined as lawyers to adopt a teleological mode of thinking, to postulate, to reform, and in all sorts of ways to lose sight of the facts as they actually are. The purpose of this paper, however, is solely to examine and describe facts as they are. The fine maxim, "Je ne propose rien, je ne suppose rien, j'expose," must be the first principle of scientific inquiry.

Being a work of general juridical nature this paper properly ought to be classifiable with no particular branch of the law. Yet it is most closely connected with private law and draws from this most of its illustrations. This is because in this branch the specifically juridical manner of thinking has been most distinctly elaborated by the labor of many centuries; because in this branch a theory of juridical thought (in connection with the administration and interpretation of the law) has actually been established, although it has proved to be insufficient; and further because in private law (and also

in penal law) it is admitted that the legal mode of thought is exclusively applicable. In this field, judgments are to be based exclusively on legal rules and legal reasons, never on grounds of policy or other considerations. Closely allied to this principle there is the fiction that the legal rules actually existing are sufficient to decide all contested cases, provided only that they are applied in proper legal manner.[2]

I have called this paper a study. It does not purport to comprehend uniformly all phases of juridical thought, nor is it intended to be a systematic treatise on the administration of the law. It deals merely with a few important but sorely neglected aspects of the subject. This involves necessarily a certain one-sidedness of presentation. The new illustrative material takes up the greater portion of space. This, however, I consider a lesser defect than the absence of concreteness which would have been caused by any different method. For this book is not intended for inexperienced persons who might be misled at once to draw premature consequences and make hasty "demands" on the basis of my statements, notwithstanding the qualifications with which they are made. It is intended for those who are able themselves to place the new data into proper relations with their own previous experience and the traditional theory.

Introduction

§ 1. *Jurisprudence and Other Social Sciences.* Jurisprudence was the first of the social sciences to be born. Of all men, judges and legislators were the first that found themselves compelled to seek a clear and conscious knowledge of the principles according to which human

[2] Cf. Code Civil, art. iv; also, *Menger*, "System des österreichischen Zivilprozesses," § 11, note 2.

beings live together. Such knowledge of the foundations of society was first acquired by learning to distinguish right and wrong. This preceded by a long way any merely theoretical curiosity and was produced by the necessities of life. As soon as the unconscious and unorganized coercion of custom was no longer sufficient to regulate the acts of individuals because, having arrived at greater intellectual independence they began to have doubts about following their impulses as before,[3] law arose in order to avoid, or mediate between, conflicts of will,[4] and became the embodiment of the rules necessary for the regulation of human conduct so far as they entered into the consciousness of men.

At first this conscious knowledge of social principles, taking the form of knowing the law, was limited to a few subject-matters, first of all to economic needs. Next the preservation of life and health was included,[5] further, the protection of the State and its established order; last of all came ethical requirements. In a one-sided manner, the object aimed at was at first merely mediation between the conflicting wills of parties. Thus primitive law was crude, imperfect, and clinging to mere externals.[6] The most obvious things only were taken hold of. As the comprehension of law advanced, however, it became necessary to go beyond considering merely the external form assumed by conflicts of human wills,

[3] *Vierkandt*, "Natur und Kulturvölker."

[4] *Roscher*, "System der Volkswirtschaft," vol. 1, section 16.

[5] *Wundt*, "Ethik."

[6] Comp. *Jhering*, "Geist des römischen Rechts," on the discrepancy between the law as it really was and as it was formulated. — For example: the evolution of traffic by barter gradually reduces the custom of lengthy higgling, which in the Orient even to-day sometimes takes days. Now what an awkward way of formulating this social tendency is the old Athenian statute prohibiting hawkers in the marketplace from sitting down. Or another: incapable of comprehending the true socially obnoxious element in robbery or murder, old Germanic laws punish "lying in wait along the highway."

else the legal rules would have failed to be even approximately in accord with the real world and the causal connection of occurrences, which are often so well concealed. Consequently the law began to pay attention to very different phenomena of psychological and social life, and recognized gradually that these had a close connection with those conflicts of human wills. Thus the law began to examine, long before any later and independent sciences, created by purely theoretical interests, took up the study of such matters, a large number of phenomena: logical and psychological ones, such as will, purpose, intention, declaration, error, coercion, passion; economic ones, like estate, value, price, utility; linguistic ones, like sentences, meanings; ethical phenomena, such as liberty, personality, honesty; political ones, like order, public authority, etc. During the early stages of the development of law popular notions were exclusively available for the necessary knowledge regarding these things, and all too often law had to work with mere substitutes for real knowledge, in the form of conceptions not thought out but obscurely felt. For centuries, if not for thousands of years, the law had to get along with these as best it could.

It was but late, after law had developed into a scientific form of jurisprudence, that a succession of other social sciences arose: such are politics, ethics, economics, logic, individual and social psychology, philology, the history of civilization, statistics, etc., and finally the most generalized of all these sciences, sociology. Some of these branches of knowledge did not arise until quite recently, while others were but lately made really fertile by a more elaborate division of labor or the invention of new methods of work.[7] Each of them treats from

[7] I call to mind comparative etymology, the study of the forms of landholding, or statistics as a scientific method.

a different point of view subject-matters which either are identical with those of jurisprudence[8] or are closely connected with the latter and mutually interact with them.

It is necessary for the science of law to keep in constant touch with these sciences, else it cannot supply the needs of life and will fall behind more and more. The rapid development of the other social sciences frequently proves false to-day what yesterday was universally held to be true. Is it possible, for instance, to retain in its entire extent a theory of criminal guilt built up on the belief in individual freedom of the will, if the hypotheses of Lombroso regarding born criminals should be substantiated, or in the face of the statistical results that throw light on the dependence of the frequency and nature of crimes upon certain conditions of environment?[9] Must not these things affect both the courts and the legislature? It is the business of legal science constantly to assimilate the results of investigations in other scientific fields, to appropriate new truths regarding the interaction of social phenomena, and to make use of the clarified conceptions of other sciences. The preparatory work is in part done by these sciences themselves. Within the complex of facts with which they deal law takes up so much room that they cannot fail to look at it from their peculiar points of view and to try their methods and results upon it.

Yet, all these sciences, even apart from the fact that they and the lawyer lack common points of departure and convergence, treat of law only in its most general aspects. In the formation of law they proceed at most as far as the creation of the various legal institutions and

[8] The law of private property deals with phenomena almost identical with the subject-matter of economics; similarly, public law has nearly the same subject-matter as political science.

[9] How profoundly these new ideas have affected all schools of penology, became very evident from the discussions and proposals at the Congress of German Jurists in the year 1902.

principles; the application of law and its technical formulation are, however, the peculiar domains of jurisprudence and are naturally never entered upon by those other sciences. Thus the latter remain at the gate of legal science proper. Jurisprudence itself must go to work and make their fruits available for the administration of justice.

This need has not hitherto been supplied with clear consciousness of purpose. It is true that in legal history it is customary to keep in touch with other historical sciences even when treating of the administration of law, in accordance with the actually existing connection between legal and other social phenomena.[10] It is different, however, in practice, regarding the examination of the living law. Here one usually turns for comparison merely to other legal branches, dealing with matters separated in time or space, but hardly ever considers the points of view or the results of other social sciences. Yet this is indispensable for jurisprudence, if one does not confine its task to merely knowing legal principles as they stand, but wishes to understand also the reasons for their development, their psychological character, and especially their functions, which can never be separated from the social reaction upon them.[11] For it is impossible to understand one aspect of social life without knowing its connection with other aspects.[12]

[10] Social conditions in which customary law prevails are generally of the greatest interest for historical research. At this stage legislation and administration of justice are not very strictly distinguished.

[11] For instance, the reason why, in the Civil Law as formerly in force in parts of Germany, women were permitted to waive the provisions of the "Senatusconsultum Vellejanum," according to which they could not be sureties, becomes very much clearer when we remember that in consequence of the development of the credit system this compulsory disability, which originally was intended to benefit women, had become a troublesome obstacle to their capacity of doing business. It was similar with regard to the prohibition of taking interest.

[12] *Roscher*, "Volkswirtschaft," section 18.

To be sure, the transference here contemplated is far more difficult than, for example, the science of comparative law, because here we have not a question of comparing similarities and dissimilarities, but rather of finding hidden connections between phenomena that are apparently quite heterogeneous.

However, the principal obstacle to the conscious introduction of new points of view in the application of law is found in certain common notions, certain traditional methods, which lawyers employ half unconsciously rather than with complete comprehension of their nature. These grew up at a time when the law still stood by itself and was simply the crystallization of popular notions; but they are clung to instinctively, and taken altogether they constitute the peculiar character of specifically legal ways of thinking. In part they are deeply founded upon the peculiar objects of legal thought, and are the products of a course of historical development. In part, however, they are nothing but the residue of ideas long abandoned, which are habitually handed on like current coin without being looked at or examined. Thereby they produce among legal thinkers a certain feeling of self-sufficiency that prevents the growth of a desire for further investigation, so that legal thinking is apt to be content when relatively brief progress has been made. The desire to question further stops when certain apparent explanations have been reached. These are characteristics which, according to Comte, are peculiar to the metaphysical stage in the development of a science.

It is the purpose of these inquiries to throw a little light upon these semi-obscure regions of thought peculiar to our special science.

I. Nature and Qualities of Juridical Thinking

§ 2. *Popular Notions.* The declared purpose of legal study at a university is not to acquire a more or less extensive acquaintance with the law, but training in juridical thinking. No principle is valued so highly by lawyers as this proposition that their science does not consist simply in knowledge of the law. (It may be admitted that the pride with which lawyers have a way of asserting this, especially in the presence of over-curious laymen, sometimes reminds one of the time when "notitia legis" was a secret lore of a few adepts.) In practice, if a lawyer wishes to disprove some assertion and cannot do so by direct reference to the statute, he invariably tries to show that such an assertion cannot be reconciled with the legal method of thinking. Juridical thinking, sometimes called strict juridical thinking, is something the lawyer is supposed to have ever at his right elbow, both as a tool and as a postulate.

Now, what is this thing called juridical thinking? What are its principles and qualities? How is it distinguished from ordinary non-juridical thinking? Is it a distinct sub-species of logic — which on its face is improbable — or is it simply a method specifically adapted to the subject-matter of law.[13] People's minds are by no means clear about these questions, and yet juridical thinking is the means of drawing a great many conclusions and inferences, of furnishing arguments, and of deciding numerous lawsuits and controversies. Somebody

[13] The significant thing about mere "method" is that its rules are always taken, openly or surreptitiously, from the subject to which they are to be applied. Method is not purely a formal law of thought. The choice of a method of research into a subject-matter is itself the expression of an opinion (in a way a preconceived opinion) regarding the nature of the subject. For instance, by choosing for linguistic or economic investigations either the historical, statistical, organic, or some other method, one betrays at once the point of view from which one looks at these things, and will arrive at different results accordingly.

has said that by virtue of a logical conclusion the ax of the hangman may fall on the head of a man or the doors of the prison close upon another, and the conclusion is held to be logical if it is in accordance with the juridical method of thinking.

The prevailing views regarding the nature of juridical thinking oscillate between one extreme and the other. Sometimes, in speaking of lawyers and their trade, one thinks of cold, calculating severity, of rigor and austerity. This has regard to the outside of law, its external and militant functions. To use the expressions of Herbert Spencer, lawyers, like soldiers, are considered as the exodermous tissue of the social organism. The judge is pictured, as described in old German law, as sitting before the people like a fierce lion. It is the notion of "jus militans," of the penal law.

From another standpoint, whence one may enter much deeper into the intimate life of the world of juridical thought, there comes the most prevalent and most frequently encountered notion. According to this, lawyers are endowed with great but rather impractical sagacity. One is reminded of finesse, subtlety, hairsplitting, and such things. These opinions, based principally on experiences with private law, used to find expression in numerous punning sayings against the civilian "perverters of justice,"[14] which showed the popular hatred of lawyers. Even to-day there exists a vague fear of legal tricks, back-door devices, of "Paragraphenreiter" (manipulators of statutory provisions), and of "India rubber provisions." No doubt such notions must be blamed principally on the ignorance of the lay public and certain perversions of juridical thinking such as Jhering (in "Scherz und Ernst in der Jurisprudenz") has castigated with mordant humor. Yet there is usually a kernel of truth in such

[14] "Jurista nequista," "Juristen böse Christen," etc.

widely spread popular opinions. This fact will furnish food for thought that other sciences are given to emphasizing that jurisprudence, like logic and mathematics, is a formal science, meaning thereby that the science of law merely treats with the forms of human thought but lacks actuality, i.e. agreement with some real, external object, or at least lacks this to a considerable extent. Differently, however, from logic and mathematics, jurisprudence makes the claim that it has reality, i.e. that it does actually supply a knowledge of positively existing matters. Under these circumstances to call legal science formal implies a charge of sophistical dialectics, and some thinkers (for example Vierkandt) have not been afraid to express that charge.

§ 3. *Postulates of Jurisprudence.* Jurisprudence does not claim general and accepted characteristics of its method, except in the case of the theory of interpretation. It does, however, insist on certain postulates or ideals, as is agreeable to its normative character. One of these postulates is the absence of passion, bias, prejudice; another is certainty or consequentiality, so that a judgment may be foreseen.

Thus for instance, Jhering says:

"An immovable sense of security is the state of mind produced by Law. If Justice herself could come down from heaven, take up the stylus and engrave a statute so definite, exact, and detailed that its application would become a mere mechanical calculation, a condition would arise than which a more perfect administration of the Law could not be conceived."

It is at a much later time that a third postulate appears, a postulate which at the present time is beginning to show itself quite frequently: Juridical thinking is to adapt itself to practical needs; it is to be practical; where conditions require, it is to have even the courage of being illogical. This third ideal is considered to be

inconsistent with the second, yet there is no tendency to give up one or the other, or to devise means to solve the inconsistency by delimiting the spheres of influence of both principles.

The ideals here enumerated are of importance for the investigation of the characteristics of juridical thinking, because they seem to point out essential qualities of such thinking and show the way our inquiries must take. It is from this point of view that we propose to examine briefly the first two of the above postulates. The third we shall not examine separately because it is so closely connected with the ideal of certainty, and also because it is so infinitely complicated. For it is mixed up with the whole mass of social interests.

§ 4. *Dispassionateness of the Judge.* Every emotion, whether of the kind psychologists call sthenic, or of the asthenic sort, implies a narrowing of the field of conscious action. It favors unreasoned, associative (i.e., determined by external factors), or impulsive mental activity over a form of thinking proceeding with due consideration according to the categories of logic, especially the principle of causality (apperceptive thinking, to use the terminology of Wundt). Briefly, every emotion lessens the capacity of the intellect to see the truth, it makes partially blind. Passionless absence of emotion is a prerequisite of all scientific thinking, that is, thinking directed to the recognition of external truths.

The reason why this requirement was insisted on by lawyers at so early a period must be sought in the circumstance that the judge is exposed more than any other thinker to emotional influences. He must come to his conclusion among the struggles of contending parties. While in the case of other sciences conflicts of wills mean annoying interference, they are the natural environment for jurisprudence, in which it carries on its

life functions. Moreover, the results of juridical thinking at once become matters of practical importance and touch the very nerve of life. Errors produced by emotion are felt most often and easiest in the field of legal thinking, and it is for this reason that lawyers were the first and the most emphatic in insisting on the absence of emotional bias.

The general public, with its deficient understanding of psychology, includes in this requirement merely the absence of individual emotions in the widest sense, "prejudice and bias for or against either party." That amounts, generally speaking, to the reasons which make a judge or juror incapable of acting according to most codes of procedure, such as personal interest, kinship, and the like. Modern social science, however, has shown that there exist, in addition to the influence of such individual emotions, a multitude of social feelings which exercise a determining influence on the way we think of and judge other persons. Such social feelings may be of a national or political, professional, religious character, may be produced by class, occupation, or other circumstances that produce a feeling of solidarity; or they may be based on ethical tendencies, historical traditions, inherited value judgments, and so forth. The more general and constant nature of such feelings is the reason why they do not usually take the form of an acute emotion and do not, generally speaking, enter into individual consciousness at all but remain below its threshold. Just the same, or perhaps for that very reason, they are apt to obscure the logical quality of thought and judgment in a manner quite obvious to a really unbiased observer. Anyone who desires a large number of examples showing how it is by no means enough, in order to be unbiased in regard to social currents by which one is himself carried along, if one has the intention of being

unbiased, cannot do better than to turn to Spencer's "The Study of Sociology.[15] There he will learn how our attitude towards the world, our whole way of thinking, is covered by a network of tendencies and cross-tendencies, how under their influence the same phenomenon may meet with the most various judgments although the critics are all imbued with the most upright desire for the truth. Modern logic (see the writings of Wundt, Erdmann, Sigwart, etc.), which has generally come close to psychology, explains these unconscious disturbances of correct thinking very well indeed.

In this connection a question arises which cannot be answered until we have progressed farther with our inquiry. Does the requirement of lack of bias mean that the judge must also disengage his reasoning from the influence of all these social feelings? Must we take the saying "pereat mundus, fiat justitia," not ironically but pathetically? Should the judge actually comply with the demand of Spinoza and never blame or praise anything human but only understand it? Must he purify his thought of everything but logical reasoning and get rid of all feeling, whether individual or social, that may disturb his logic? Is such purification possible to all? Does it ever exist?

§ 5. *Certainty of the Law.* There are two aspects of the certainty of the law, just as there are two aspects of its uncertainty. One has reference to the actual enforcement of recognized (i.e. existing) law, and the rarity

[15] I cannot resist the temptation to recall an excellent observation of Nietzsche to the effect that we are by no means indifferent to our own concepts and mental images, but are fond of some and constantly recall them, while we have a dislike for others and try to exclude them as much as possible. We may mention such ideas as death and illness. In the face of every mathematical calculation the chances of winning always look greater than they are to the gambler, because he is constantly calling them up in his mind. This is the reason why lotteries, raffles, and the like are so immensely profitable.

of conscious violations. This aspect was in the mind of the Oriental sage who represented the ideal legal condition as one in which a beautiful woman, adorned with all manner of precious ornaments, might travel throughout the country alone. This kind of certainty of law was missed very much throughout mediaeval Europe. Up to a certain point law must always yield to the circumstances, else it cannot be taken for real or positive law. Where within a society (not necessarily with regard to strangers) robbery is a general custom, it is evident that the conception of property is so little developed that one cannot speak truly of the violation of property rights. Where all are stealing none is a thief, as a Russian proverb aptly puts it. It must be possible, to some degree at least, to consider the rules of law as the natural laws of society. What ought to be must to some extent be identical with what is.[16] But the degree of this identity varies. It will rise as the State becomes stronger, for the State represents the feeling of solidarity of all members of the nation. The State, as a matter of fact, has substantially succeeded in establishing the certainty of law in this sense. Open opposition by force has been suppressed almost entirely. The battle is now against the more insidious forms of opposition, such as corruption, theft, the concealment of criminal acts, abuse of legal process, as well as against negligent disregard of law.

The other aspect of uncertainty of law is caused by the difficulty of knowing what the law is. An example of

[16] *Bierling* ("Kritik der juristischen Grundbegriffe," vol. 2, sects. 250, 257, and excursus B, page 353) differs from the above in part. He opposes *Zitelmann*, who draws a parallel between natural and juridical law in his work entitled "Irrtum und Rechtsgeschäft." Natural laws are distinguished from normative laws by their absolute universality. They tolerate no exceptions and are therefore conceived as qualities of the objects themselves, while norms of law or morality are external commands derived from some third authority such as God, the State, etc. (Comp. *Wundt*, in the introduction to his "Ethik.")

confusion of law is afforded by the conditions prevailing in Germany after the reception of the Roman law. The remedy against this kind of uncertainty must be found in the perfection of legal science. The postulate of certainty in juridical thinking, which was mentioned above, has to do with this aspect of legal certainty only. It has reference to the degree of certainty with which may be discovered, in each case of a conflict of wills, what the law is in regard thereto. The characteristic of the highest possible degree of such certainty would be that all results of juridical thinking, in other words all decisions of the courts, would be uniform and predictable, i.e. could be exactly calculated in advance.

Now have we a right to call this postulate of certainty the distinguishing and characteristic quality of juridical thinking? Is this its specific form of precision and exactness? I am afraid the answer must be in the negative, although I appreciate fully the progress made in this direction and do not wish to make unscientific and extreme statements.[17] I might cite a number of expressions that seem to be based on a similar conclusion. While the codification of the civil law of the German Empire was in progress, some men of the highest learning and official position took occasion to express the opinion and expectation that some of the defects for which the draft code was blamed would in practice be remedied by the courts. Evidently this implied the presumption that the courts might interpret the same statute either one way or another without offending against their legal duties and especially the canons of juridical thinking.

It implies the assumption of a considerable degree of elasticity of juridical thinking, when von Schey is of the opinion that legal science will find ways and means of

[17] Some people have even talked about fashions in the administration of justice.

emphasizing economic considerations as opposed to the purely abstract treatment of the law of property in the German code provisions,[18] or when Dernburg suggests to the courts that they help out the defects of the code in connection with the prohibition of counterclaims in case of actions for certain kinds of wages by the manner in which they apply the law of liens; or when, as Exner does here in Austria in his treatise on "Hypothekenrecht" [19] the courts are asked to find a remedy for the inequitable results sometimes following confusion of goods when a mortgage is extinguished. Still more important than such individual views are legal institutions which are evidently based on similar assumptions. The forms of civil procedure are obviously arranged on the assumption that ordinarily each party is convinced that he is right.[20] This is particularly apparent in those jurisdictions where the losing party does not necessarily have to bear the costs. For if conscious wrongdoing were involved, it would not be sufficient that the wrong be declared to be such and a remedy afforded. The wrongdoer ought also to be punished.

The matter is still clearer in connection with the institution of advocacy. If in a criminal proceeding it is the business of the attorney for the prosecution to demand punishment, while the attorney for the defense will ordinarily conclude that the facts, which possibly are undisputed, require a verdict of not guilty, one would have to call that whole institution immoral, if it were true that correct juridical thinking always had to draw exact conclusions from a given state of facts. For one or

[18] Paper read before the Law Society at Vienna, February 5, 1902.

[19] Section 20.

[20] That implies an admission that the parties may infer the existence of opposite rights from the same state of facts. In this connection we must exclude those cases where the facts themselves are doubtful and are not ascertained except in the course of the trial.

the other, either prosecutor or defender, must then be either an ignoramus or a perverter of justice.

Similarly, the ineradicable opposition between theoretical thinkers and the actual practice of the courts indicates the elasticity of juridical thinking. In the resulting warfare, the courts are given to ignoring the authority of theoretical jurists,[21] while these retaliate with polemical writings. Again, there are numerous scientific controversies evidently not capable of settlement by simple exchange of arguments.[22] Later on, we shall show how this uncertainty is partially concealed by representing a large part of juridical thinking as an inquiry into the facts. This does not, to be sure, eliminate the coefficient of uncertainty, but for reasons of proper decorum removes it to a place where it does not create the impression as if the judge himself were incapable. If the fact of uncertainty is to be seen in all its nakedness, one has but to observe the guessing process that goes on regarding the decisions of our courts of last instance, in which the facts are taken as they were found in the courts below, and where ordinarily there is but one question: What is the law applicable to these facts?

A layman is likely to be surprised and annoyed if in case of a legal dispute he cannot get a categorical answer or is given several conflicting opinions. According to his idea that is what lawyers are for: to give definite answers. The lawyer himself has become used to this condition of things, but ordinarily he does not give an account of himself regarding the general reasons for such uncertainty. Frequently negligence in the drafting of

[21] Opinions rendered by lawyers will not be considered by the courts. Compare with this the high importance attached by our courts to expert opinions rendered by university faculties of medicine.

[22] For instance, let anybody submit the collection of civil cases made by *Jhering* ("Zivilrechtsfälle ohne Entscheidungen") to a number of jurists for their opinions.

statutes is blamed for such controversies. There is often some truth in this, but this feature falls far short of covering the whole field of legal uncertainty. Aside from this, however, lawyers are mostly without general notions regarding this matter and content themselves with talking vaguely about the difficulty of particular cases. This explains the reasons for the complaints frequently made, that it is impossible to train practical lawyers by academic instruction.[23] The young lawyer is usually quite unprepared for this greatest difficulty in the administration of law. He leaves the law school with courageous confidence in his ability to solve problems, and learns by slow experience how difficult they are, till gradually he gets rid of intellectual conceit and rashness.[24] These are questions, however, which I shall no more than suggest, and instead we may now come to the following conclusion:

This second ideal, certainty of the law, also fails to justify us in inferring that such certainty is a characteristic quality of juridical thinking.[25] It is necessary, therefore, to inquire what may be the reason for such uncertainty, by what means it has been mitigated, and how and to what extent it may be still further mitigated.

II. The Current Theory of Interpretation: Critical Examination of its Principal Tenets

§ 6. *General Survey; the Principal Defect.* In the science of private law, a doctrine has been evolved which comes nearest to being a theory of juridical thinking. That is the doctrine of interpretation, sometimes called

[23] It also explains all kinds of projects to reform, such as the establishment of a sort of legal clinic at the universities.

[24] Comp. the sarcasm *Jhering* directs against his own youthful experiences in "Scherz und Ernst in der Jurisprudenz."

[25] One would incline to think that the ideal was generated by the very fact that this quality was not found to exist.

legal hermeneutics. I want to anticipate here that this does not comprise the whole subject-matter of the field of juridical thinking. It neglects the technics of legislation, further the phenomenon which later will be described as "projection," i.e. the projection of a legal conception upon the facts, and generally the entire great field which forms the boundary between the mere finding of facts and interpretation proper.

Aside, however, from the limitation of its subject-matter, this doctrine labors under a cardinal error that renders it almost valueless. The propositions which guide interpretation, and generally the administration of law, are not conceived simply as natural regularities but as directions, in other words they are themselves considered as legal rules.

This phenomenon is evidence of an acquired habit of lawyers. They are constantly occupied with manifestations of will, such as rules or orders. Consequently they tend to see all things from the point of view of a purpose, never simply as something which exists. A lawyer does not simply wish to investigate the natural laws by which things are as they are, but to regulate and rule them. It is quite evident that this starting point in the doctrine of interpretation is erroneous, that is, it cannot produce results corresponding with the real world. For the rules governing the interpretation of law are not themselves law, or the result of legislative will. The legislator may command or prohibit. He must needs choose such means of expressing his commands as are comprehensible to those to whom they are directed. If a command is ineffective, on account of being misunderstood or the like, the legislator may supplement it by a new command, differently expressed. It is not within his power, however, by making rules to increase the measure of comprehension with which his commands are received,

to regulate and improve by arbitrary rules the interpretation, that is, the sense in which other minds accept the expressions he uses. He can do nothing but make a rule. The manner in which it is understood is governed by general social, psychological, logical, linguistic, or other natural laws.[26]

The laws governing interpretation are natural laws, not legal norms. Or does anybody imagine that any misconception will be prevented or the interpretation in any manner affected, when a statute provides something like this: "In applying a statute, no meaning shall be given to it except such as appears from the specific sense of the words in their context and the clear intention of the legislator"? (Austrian Civil Code, § 6.) Just as it suffices if a law provides for something so that it would be logically[27] useless expressly to provide for obeying such a law, just so does it suffice if the legislator expresses his intention in an intelligible manner, and it is superfluous to add the rules by which his expression may be understood.[28]

However, this proposition must be taken with a very important reservation. Very frequently new rules of law are concealed in what has the form of rules of interpretation, in a manner similar to cases where a new rule of law pretends to be merely declaratory of an existing one.[29] This is easily explained for anybody who has a

[26] This is aptly put by *Unger* in the introduction to his "System des österreichischen Rechts": "The key to the understanding of a code must be procured elsewhere than in the code itself."

[27] Psychologically, the matter may have a different aspect, as is shown by the effect of republication or impressive repetition of rules.

[28] As a matter of fact, the custom is disappearing from modern legislation.

[29] It is by no means a matter of indifference whether the legislator commands the application of a rule with or without extension to analogous cases. This command, however, is an additional expression of his will, not contained in the other provisions of the statute. It is in reality not a rule of interpretation but a new rule of law. Compare, inter alia,

clear idea of the similar phenomenon which Jhering, in his "Geist des römischen Rechts" calls the crystallization of legal rules into legal concepts. At a certain stage in the technics of lawmaking, it is common for laws to lose their imperative form of direct command and assume instead the form of abstract concepts from which the direct commands have to be inferred. The expressions defining such abstract concepts,[30] however, have the same or greater effect as new direct commands, although they are clothed in the form of mere interpretation.[31] The science of interpretation must not allow itself to be misled by this. The legislator may choose any form he pleases for his commands, but it is the business of jurisprudence to reveal the true nature of legal rules no matter in what form they may be concealed. Real rules of interpretation must be sought where they actually may be found, by tracing the treatment to which formulated legal rules are subjected in the course of actually applying them.

The theory of interpretation as it is found in books on private and criminal law, and occasionally in those on procedure,[32] usually confines itself to considering laws taking the form of rules or commands. These are comparatively rare in modern statutes. Consequently it is common to go back to the Civil Law and refer to the "Corpus Juris," as if the opinion of some Roman or

such rules of interpretation as "in dubio contrâ fiscum," or "quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit."

[30] See *Thöl*, "Einleitung in das deutsche Privatrecht," section 33, on rules defining concepts. Comp. also *Bierling*, "Zur Kritik juristischer Grundbegriffe," vol. 2, section 13; *Merkel's* article in *Holzendorff's* "Enzyklopädie der Rechtswissenschaften."

[31] For instance: where a statute provides that parents must leave to each child a portion of their estate, and continues: "Adopted children are included in the term children" (Austrian Civil Code § 763), the last clause has the form of an interpretative rule but is in reality a new rule of law extending the right to a portion to adopted children.

[32] E. g., *Anton Menger*, "Der österreichische Zivilprozess."

Civil Law jurist were decisive for all time on questions like this: whether specific provisions may be extended by analogy[33]; whether logical interpretation may go beyond the possible meaning of a word,[34] whether "cessante ratione cessat lex ipsa." For this reason works on legal hermeneutics are apt to be excessively full of Latin sentences and Roman technical terms, although in systematic treatises the chapters on this subject are apt to be briefer. No matter how much we may acknowledge the tact and the gift of intuition found among Civil Law jurists, it must be admitted that they were ignorant of many phases of social function with which we have become familiar by statistical, economic, and similar studies. Therefore we are not relieved of independent investigation when we have found some dictum of the Civil Law. It is true that those old jurists often judged excellently on specific and particular cases; yet their rules of interpretation, which should naturally be of a general character, are frequently nothing but generalizations made in a one-sided manner out of a decision applying merely to such specific and particular case.

That is the reason why the rules of interpretation, as they are actually found in the Civil Law, are so full of contradictions.[35] For instance, if it is a question of preventing a legal rule from being twisted, it is said: "Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio" (De legibus et senatus consultis, Digest I, 3); or, in connection with wills, "non aliter â significatione verborum recedere oportet quam si manifestum

[33] "Quod contrâ juris rationem receptum est, non est producendum ad consequentias."

[34] *Unger's* "System," chapter 3, section 3, par. 2; and note 33, where the author disagrees with *Schomann*.

[35] Hence *Georg Frensel* ("Recht und Rechtssätze," Leipzig 1892, p. 40) says truly that there is always a possibility of several "lawyer-like operations" to extract a clear rule from an ambiguous statute, and that the courts must select one of these.

est aliud sensisse testatorem." But at another time it is said, "Sed etsi maxime verba legis hunc habent intellectum, tamen mens legislatoris aliud vult"; or, "Non dubium est in legem committere eum qui verba legis amplexus contrâ legis nititur voluntatem." If one intends to apply a rule without distinction it is said, "Lege non distinguente nec nostrum est distinguere," or "et ideo rationes eorum quae constituuntur inquiri non oportet." But where the sense of justice refuses to consent to a strict application of the rule, you may say: "Placuit in omnibus rebus praecipuam esse justitiae aequitatisque quam stricti juris rationem,"[36] or cite the famous "cessante legis ratione cessat lex ipsa." If one wishes to restrict a rule to its original field of application it is said that "exceptio firmat regulam in casibus non exceptis," or more specifically, "Cum lex in praeteritum quid indulget in futurum vetat" (the so-called "argumentum â *contrario*"); but if one wants to extend the rule there is a simple reply: "Unius positio non est exclusio alterius. Ratio ubi eadem convenit, idem juris est." [37]

It is interesting to see commentaries and systematic treatises[38] labor to reconcile all these contradictory maxims by a thousand provisos and qualifications.

§ 7. *Results of Interpretation Classified in Accordance with the Prevalent Theory.* The Romanizing doctrine of interpretation posits as its goal the ascertaining of the meaning (intention, contents, will, "mens," "sententia," etc.) of the legal rule. It lays particular stress on finding the relation between the "sense" and the "text" of a

[36] "Aequitas" means a fair consideration of individual differences.

[37] Comp. Codex Theresianus, v. 86: "Where the reason for a law is the same, the law must be the same." ("Ubi eadem legis ratio, ibi eadem dispositio.")

[38] Comp., for instance, the chapters on the theory of interpretation in *Unger's* "System."

formulated rule. This relation differs, according as the ascertained sense is coextensive with the text, or diverges in varying degrees. Thus is obtained the well-known scale, as follows:

1. "Interpretatio extensiva," where the sense is broader than the text.
2. "Interpretatio lata," where the text is ambiguous and is liberally construed.
3. "Interpretatio declarativa," where text and meaning are coextensive and unambiguous.
4. "Interpretatio stricta," where the text is ambiguous and is construed strictly.
5. "Interpretatio restrictiva," where the meaning is narrower than the text.

The whole taken together constitutes "interpretatio declarativa" in its wider sense.

Some add to the scale the case where the meaning differs from the text ("interpretatio obrogans," or corrective interpretation); others deny the propriety of this subdivision. The case is really a combination of cases one and five.

This table ought to be supplemented, however, by putting as the first subdivision interpretation by analogy, and as the last subdivision interpretation by solving an antinomy. The former exists where notwithstanding a broad interpretation the meaning will not cover the given state of facts, and yet the rule is applied. The other is used where a given state of facts will be fitted equally by two possible meanings of a rule, even after the rule has been strictly construed. These two subdivisions are formed, not by merely considering the relation of text and sense, but by considering also the relation between the state of facts and the sense. For this very reason the use of these forms of interpretation is apt to cause the most obstinate contentions, as will be further considered below.

The scheme of sevenfold subdivision of the results of interpretation, thus arrived at by adding interpretation by analogy and by solution of antinomies, is exhaustive and covers the whole field, as will appear from a logical examination. For it runs through all the intermediate steps from the case where even the widest possible sense given to the text is insufficient to the case where even the narrowest meaning of which the text is susceptible still leaves more than one possible application of the rule to the facts.[39]

§ 8. *Criticism of this Classification.* The first demand to be made of a proposed scheme of subdivision is that it shall employ characteristics that may actually be recognized, so that the scheme is capable of being

[39] This being so, it is surprising that some legal authors speak of "development of the contents of the statute" ("Entwicklung des Rechtsinhalts") as a separate mental operation, without making plain why the single mental operation directed towards finding, from the text of the statute, what the legal rule is, should be divided into two distinct operations. Commonly this "development" is disposed of very briefly by giving a few illustrative forms of reasoning. (See *Unger's* "System des österreichischen Privatrechts," section 3, sub lit. B.) What is included, is substantially the following:

1. Inference of the means intended from the purpose declared.
2. "Conclusio â majori ad minus."
3. "Conclusio â minori ad majus."

Possibly one might add the principle which prohibits "in fraudem legis agere."

Opinions differ whether the "argumentum â contrario" should be counted as "development" or interpretation. However, the division into interpretation and "development" lacks clearness and should not be adopted. It originated with the circumstance that certain observations regarding the process of interpretation, which were accurate but stood all by themselves, would not fit into any compartment of the scheme set out above, partly because the scheme is meaningless, partly because it is not practicable. So they made a new category for these observations, because they did not know what else to do with them, and gave this category the name "development." However, it is very hard to see why it is not interpretation (let us say extensive interpretation), when a lawyer holds that a party who under a statute has the right of taking water from a certain spring also has the right of access to the spring (a case of inference regarding the means from the purpose). It is hard to see where there is a difference in principle between this and ordinary interpretation.

carried out. A mere "ideological" subdivision, under which it remains doubtful whether a thing falls under one class or the other, is a metaphysical monstrosity and should be banished from sciences claiming to be practical and exact.

Even to this simple requirement the schematic subdivision of the results of juridical thinking into seven classes, as set out in the preceding section, does not altogether conform. Let us try to measure the actual world by this scheme of seven classes.

It is striking to find that the very textbooks in which it is claimed that the various classes, such as interpretation by analogy and "interpretatio extensiva," are "strictly distinct" or "cannot be confounded," are contending among themselves as to which class the illustrations selected by them belong. For instance, Savigny[40] offers as an illustration of "interpretatio extensiva" the case where a statute requires witnesses in order to make some transaction valid, but does not name their number. Unger[41] and Thöl[42] severally argue otherwise and hold that the number of witnesses necessary can in this case be discovered scientifically in no way but by supplementing the legislative will, i.e. by analogy. The word "father" in section 150 of the Austrian Civil Code[43] is understood by Pfaff-Krainz[44] to include the mother, and this act of thinking he describes as an

[40] "System des heutigen römischen Rechts"; *Wächter* is of the same mind.

[41] "System," § 10, note 31.

[42] "Einleitung in das deutsche Privatrecht."

[43] The section reads: "Where the usufruct is granted to the father by the party from whom the child derives his estate, the rents and profits remain liable for the support of the child in accordance with his station in life and cannot be taken in execution by the creditors of the father to the detriment of such support of the child." — The Supreme Court decisions of January 28, 1884 (GU 9853) and March 7, 1865 (GU 2132) adopt the doctrine of *Pfaff-Krainz*.

[44] "System des Privatrechts," § 13, note 21.

instance of extensive interpretation. Not a few minds would object to that and call this a case of the purest analogy.

To appreciate the full significance of such controversies one must not forget that the illustrations selected are naturally typical ones, that is, cases which exhibit the characteristics in question with particular clearness. Now, if it is possible to doubt even such examples, it must appear that the grounds on which the subdivisions are made are but specious ones. This is also brought out by Pfaff and Hoffmann, when in their Commentaries on the Civil Code[45] they speak of the point of indifference between broad interpretation and mere analogy; in fact many defects of the traditional doctrine of interpretation are shown up by these authors.

Nevertheless it must be admitted that on the whole a line may really be drawn between those cases where the result of legal thinking is contained in the meaning of the text, and on the other hand those where that is not the case,[46] and that the traditional division into seven classes may be carried out in so far as it agrees with the above division into two groups. In this I am anticipating what I intend to treat more fully in the next section.

Yet even if one may, on the whole, carry out the subdivision into seven classes that does not prove that it is justifiable. It would be quite possible to classify all animals according to color, or all plants according to size, but nobody would think of such a thing. Every subdivision must be not only feasible but also, as the saying goes, productive; otherwise it is a meaningless cutting-up of the subject. To be productive means that it is possible to connect particular ideas of importance

[45] Ad §§ 6, 7.

[46] Or, to use the accepted terminology, cases of "interpretatio lata," either "declarativa" or "stricta."

for the purpose in view with each particular class. Speaking juridically, each subdivision must be subject to a particular rule.

As a matter of fact, attempts used to be made to establish rules of this sort for those cases where a narrow interpretation was to be proper, and those in which words were to be taken in their broadest or their narrowest meaning. For instance: amendatory statutes are to be strictly construed [47]; grants in favor of a particular person must be strictly construed where, in a concrete case, they act unfavorably towards him [48]; special privileges according to some are to be liberally and according to others strictly construed [49]; declarations made before an officer are to be more liberally interpreted than those made in private [50]; particular rules derogatory of general ones must not be construed broadly nor extended by analogy. With the single exception of the rule that a particular rule shall not be extended by analogy,[51] one may well say that all such maxims lack any vigorous, illuminating power of convincing. They are still carried along in the introductory chapters of textbooks, only to be disregarded later on. Whenever they are appealed to in practice, they are merely offered as ostensible reasons, while consciously or unconsciously the true reasons of the person using them are entirely different.

[47] "Correctoriae leges sunt stricte interpretandae."

[48] Codex de legibus, 1, 14: "Quod favore quorundam constitutum est, quibusdam casibus ad laesionem eorum nolumus inventum videri." *Pfaff-Hoffmann* still acknowledge this rule.

[49] "Beneficium imperatoris, quod â divino scilicet ejus indulgentia proficiscitur, quam plenissime interpretari debemus." (Corpus juris, Tib. de auctoritate etc. 1, 4.) Exactly the opposite in Codex Theresianus, v, 90: ". . . . . It is to be the general rule that no privilege is to be construed broader or more extensively than the plain text of the instrument granting it, but is to be most strictly interpreted."

[50] *Avenarius*, "Interpretationum libri v," book 2, chap. 30: "In judiciis latior sit interpretatio quam in contractibus."

[51] "Not a productive principle," says *Jhering*, "Geist des römischen Rechts," sect. 4, note 18.

As a matter of fact they are falling more and more into desuetude.

These detailed distinctions based on the relation between text and sense have sometimes been used in legislation as well as by legal science, especially often by way of prohibiting a liberal or a strict interpretation in particular connections.[52] These prohibitions have proven impracticable and difficult of enforcement, and are now generally abandoned.[53]

§ 9. *The Methods of Interpretation Classified in Accordance with the Prevalent Theory.* The classification treated in the preceding sections is a subdivision of the accomplished results of juridical thinking, with an eye especially on the relation of text and sense. It is a classification made from the standpoint of the systematizing theorist. If we start from the standpoint of the practical lawyer who is not dealing with finished results in the shape of decisions already rendered but is looking for the right way of deciding his cases, we shall be more interested in a classification of methods than results. Then we shall discover the customary subdivision into grammatical and logical methods of interpretation. The former attempts to attain its object by a consideration of the language or words of the text; the latter employs different means. The idea underlying this classification of methods is the same as in the above classification of results. There are here two equations representing in different forms the same function and therefore neces-

[52] E.g., Codex Theresianus, v. 81, line 2: "Nobody is permitted to extend or narrow the application of a statute on pretext of a difference between the text and meaning." There is a trace of this attempt in OBGB, section 771, where we read: "within the letter and the meaning of the statute."

[53] In penal law the prohibition of analogies is still in force, as regards the construction of criminality or penalties out of states of fact. The same effect, however, is often obtained by excessive projection. For instance when the usury laws had been repealed [in Austria], facts formerly constituting usury were treated as frauds.

sarily in strictest dependence on each other. The more independently, pregnantly, decisively the grammatical method of interpretation is contrasted with the logical method, the more justified shall we be to distinguish results contained within the literal meaning of the text from those without. The best test of a proper classification is precisely this: that the various classes established are genetically distinct, and that they have a difference of origin. And precisely because genetically a classification according to the meaning of the text can produce but two subdivisions I cannot admit that the scheme of seven classes treated of in the preceding section is in reality anything more than a division into two classes. Now, if we consider the division of interpretation into grammatical and logical interpretation more closely, we shall discover that logically this classification is built on the importance of the linguistic factor, but goes no farther. This is just what is meant by speaking of "grammatical" interpretation; but the other class has really no significance at all. It is put down merely to make the scheme complete, is merely the opposite of the first class, but has no positive value at all. For it is certainly no positive and valuable contribution to knowledge, no characteristic of some specific method, to assert that we must never lose sight of logic, and especially not while we are conducting a scientific inquiry. Grammatical interpretation likewise needs to be logical.

It is generally admitted that this second class is vague and meaningless, but sometimes the attempt is made to represent the trouble as one of terminology merely. The expression "logical" interpretation is too vague, it is said. Nobody, however, has yet found a better term. We might as well admit that it is not a question of finding a fitting name for a definite conception, but the second class simply does not represent a definite conception.

That is why one has to resort to such all-embracing terms as "logical," or sometimes "philosophical," or, according to Thöl, even "juridical."

Savigny was the first to make an attempt at substituting something definite for the vagueness of these general expressions.[54] He brought to emphasis, by the side of the linguistic element, the systematic and the historical factors. Thus he obtains the grammatical, historical, and systematic methods of interpretation. Recognizing, however, that there are still other means of interpreting, he holds the notion of "logical" interpretation in reserve as a fourth category. This quadruple classification clearly enough recognizes three important factors in interpretation: the linguistic element; the tendency to reduce all legal rules to a single, unified, and self-consistent will; and finally the element of conservatism.[55] Savigny's way of expounding the subject has become a permanent part of the theory of interpretation, although his most eminent pupils have rejected his classification. It is characteristic of the scholasticism still prevalent in jurisprudence that they did so, by no means because they claimed it to be erroneous but because it was not exhaustive.[56] They said that there were still other factors in interpretation — in other words, his classification was rejected by them because it offended their sense of symmetry. Is it likely that in the natural sciences anybody would reject a new truth merely because it did not completely exhaust the subject?

[54] "System des heutigen römischen Rechts," vol. i, pp. 212 seq.

[55] *Savigny* called this the historical method, and while he emphasized it strongly, he defined it too narrowly. Fixing his eyes, as lawyers are apt to do, on the regulative feature, he defines the historical element in interpretation exclusively as regard for the condition of the legal rules referring to the point in question at the time when the statute to be interpreted was adopted. However, there are still other phenomena due to the conservative factor. Comp. chapter iv, last section, infra.

[56] E.g., *Thöl*, "Einleitung in das deutsche Privatrecht," § 59, note 2.

However, Savigny himself did not entirely realize the value of his classification. For instance, in his discussion[57] of the means of construing defective statutes, he abandons his own division and proposes the following list:

1. Intrinsic consistency of legislation.
2. Connection of the statute with its reason.
3. Intrinsic (?) value of the meaning arrived at by construction.

The first of these means is identical with the systematic factor. The third and last lacks all scientific definiteness. About the second we must say a few words.

§ 10. *Reason ("ratio") of the Law.* The reason or "ratio" of the law is the keystone of the theory of interpretation as elaborated for private law. The distinction drawn between two methods of interpretation and the differences between the results obtained accordingly naturally provoked the question what justification there was for either method and according to what rule one or the other was to be adopted. Obviously, in favor of the grammatical method there is the text itself. But how can one justify a deviation from the sense obtained according to the ordinary rules of the language? Still more, by what right are cases not provided for by the text decided by analogy? The customary answer to these questions reads, the justification lies in the "ratio" of the law; and this conception has to be worked out elaborately in order to cover the question of analogy. The conception of "ratio legis" is a very comprehensive one, and the practice of construing by analogy is founded on but a part of it. In theory, it is customary to set certain limits to the applicability of this doctrine of "ratio legis," but in practice lawyers recognize almost no bounds to its employment in justifying the application of the "logical" method of interpretation. Every

[57] Op. cit., § 35.

time anybody wishes to deviate from the letter of the statute he calls in the "ratio legis" to justify him. The conception of "ratio legis" may therefore be considered as correlative with that of "logical" interpretation,[58] subject however to certain reservations. The notion of "ratio legis" is consequently quite as vague and indefinite as that of "logical interpretation." . . . The traditional theory of legislation itself distinguishes several different meanings attaching to the term "reason of the law." Especially, a distinction is drawn between the external circumstances causing the making of the rule ("occasio legis") — a distinction borrowed from the historical sciences, — and a more profound reason for its existence, which one may call the legislative and political reason, or the "ratio legis" in the narrow sense. As the distinction between occasion and cause is used in the historical sciences, which aim at describing empirical reality,[59] it is exhaustive, covering the whole series of happenings constituting the cause of a given event. All such happenings are either cause or occasion, there is no third possibility. In fact, as long as one adheres strictly to actual events, no third possibility can well be conceived. The teleological character of legal science, notwithstanding the claims made that it deals merely with things as they positively are, appears clearly from the fact that lawyers recognize a third species of "ratio legis," and moreover lay especial emphasis on this third species while the other two are considered of secondary importance. It is this third species that must explain and support the use of analogy for construction. There is a consensus of opinion that the occasion of the law, as well as the political and legislative reason for it, are both use-

[58] The older theorists so define it. For instance, *Dr. Eckhart* in "Hermeneutica juris" (sect. 33) says: "Dialectica [i.e., logical] interpretatio in eruendâ legis ratione versatur."

[59] It is different in the philosophy of history.

less for the purpose of justifying construction by analogy.[60] The third species, which we call particularly "ratio legis," is not contained in the body of rules itself but must first be discovered by the lawyer. It may therefore well be called a higher rule, or a "principium generale," a higher principle of which one or more of the existing rules of law are merely the results, or the logically deducible consequences.

Teachers of law assure us that it is possible to discover, by means of the logical operations of induction and abstraction, out of the legal rules actually before us, this original principle with scientific exactitude, and then, by the equally logical method of deduction, not only to revert to the legal rules from which we started but also to discover a number of additional rules of equal value.[61] This process is said at no point to lose its strictly logical and exactly scientific character; consequently the new rules so discovered are represented as positive law, that is, law intended by the legislator, quite as much as the acknowledged rules from which we started originally. In this way, it is further asserted, we are enabled to avail ourselves of the newly found rules to supply law for the unprovided cases, without ever deviating from the rules of positive law, and thus the use of analogy is explained.[62] To be sure, one is apt to ask at

[60] *Unger*, "System," section 10; similarly *Thöl*, "Einleitung in das Privatrecht."

[61] Comp. *Thöl*, "Einleitung," section 55. According to him, it is the function of jurisprudence to find those legal rules which are not plainly expressed. He believes that the ruling principle from which the rule follows is found by abstraction, and conversely, this principle may, by deduction or the drawing of consequences, be carried out into its details. Thus jurisprudence may determine in advance what the judgment must be when a corresponding case comes before the court. Next (sect. 64) he defines analogy as the discovery and application of a principle. Consequently he holds that construction by analogy is a logical deduction from the principle underlying a rule. It is purely a relation of premise and conclusion.

[62] *Unger* ("System") is so confident that this method is reliable as to say outright, in speaking of section 7, OBGB, and the law of nature:

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